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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 62

HALCYON LINES AND VINKE AND COMPANY, PETITIONERS,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION

No. 197

HAENN SHIP CEILING AND REFITTING CORPORATION, PETITIONER,

vs.

HALCYON LINES AND VINKE AND COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI (62) FILED MAY 18, 1951.
PETITION FOR CERTIORARI (197) FILED JULY 20, 1951.
CERTIORARI GRANTED OCTOBER 8, 1951.

TABLE OF CONTENTS OF APPENDIX.

	Page
Relevant Docket Entries	1a
Complaint	6a
Answer of Halcyon Lines and Vinke and Company to Complaint	10a
Third-Party Complaint	13a
Stipulation of Counsel	16a
Answer of Haenn Ship Ceiling and Refitting Corporation	17a
Defendants' Answers to Interrogatories	20a
Petition to Penalize Defendant for Failure to Make Discovery	24a
Answer of Halcyon Lines and Vinke and Company to Petition to Penalize Defendant for Failure to Make Discovery	28a
Exhibit "A"	33a
Opinion, October 26, 1949	40a
Excerpts From Testimony	43a
Third-Party Plaintiffs' Evidence.	
Lark Kuipers—	
Direct Examination	43a
Cross-Examination	53a
William T. DeWitt—	
Direct Examination	59a
Cross-Examination	61a
Theodore Knopf—	
Direct Examination	62a
Laurens Westerhoff (Deposition)—	
Direct Examination	70a
John M. Campbell—	
Direct Examination	76a
Cross-Examination	79a
Frederick Albert Knopf—	
Direct Examination	79a
Cross-Examination	82a
Frank Rickert—	
Direct Examination	83a
Cross-Examination	93a
Re-Direct Examination	97a
Re-Cross-Examination	98a

TABLE OF CONTENTS OF APPENDIX (Continued).

	Page
Pieter Reedeker (Deposition)—	
Direct Examination	98a
Pieter Pronker (Deposition)—	
Direct Examination	103a
Arie Van Der Lee (Deposition)—	
Direct Examination	106a
Alfred Millard (Deposition)—	
Direct Examination	110a
Cross-Examination	116a
Salvadore Baccile—	
Direct Examination	121a
Cross-Examination	128a
Re-Direct Examination	133a
Re-Cross-Examination	134a
Discussion of Points for Charge	137a
Charge of the Court	152a
Third-Party Plaintiffs' Points for Charge	169a
Third-Party Defendant's Points for Charge	170a
Verdict	173a
Opinion, April 3, 1950	175a
Order, April 3, 1950	180a
Proceedings in the United States Court of Appeals for the Third Circuit	181
Stipulations re filing of appellant's brief and appendix	181
Opinion, Kalodner, J.	183
Order re costs	189
Judgment Case No. 10213	190
Judgment Case No. 10219	191
Petition for and order staying mandate	192
Clerk's certificate	193
Orders granting certiorari	194

TABLE OF CONTENTS OF APPENDIX IN CASE

No. 10,219

	Page
Relevant Docket Entries	1a
Complaint	4a
Answer to Complaint	8a
Third-Party Complaint	11a
Stipulations re filing of appellant's brief and appendix	181
Answer	15a
Charge of the Court	18a
Opinion	41a
Order	46a

Appendix.

RELEVANT DOCKET ENTRIES.

Oct. 7, 1947.	Complaint filed.
Oct. 7, 1947.	Summons exit.
Oct. 7, 1947.	Plaintiff's demand for Jury Trial filed.
Oct. 17, 1947.	Summons returned "On October 13, 1947 served" and filed.
Oct. 30, 1947.	Appearance of Rawle & Henderson, Esq. for defendant filed.
Dec. 5, 1947.	Answer filed.
Dec. 17, 1947.	Plaintiff's interrogatories to defendant filed.
Feb. 26, 1948.	Defendant's answer to Interrogatories, filed.
Mar. 4, 1948.	Defendant's notice of taking deposition of S. Baccile, filed.
Mar. 12, 1948.	Order to place case on the Trial List filed.
Mar. 15, 1948.	Motion by plaintiff for production of documents etc. and Order of Court granting motion filed. 3/16/48 Noted and Notice mailed.
Apr. 21, 1948.	Motion to join Third-party defendant and Order of Court granting motion filed. 4/22/48 Noted and notice mailed.
Apr. 21, 1948.	Third-party complaint filed.
Apr. 21, 1948.	Third-party Summons exit.
May 14, 1948.	Summons returned "and served on April 28, 1948" and filed.
May 17, 1948.	Appearance of Krusen, Evans & Shaw, Esqs., for thirty-party defendant, filed.

May 18, 1948.	Order of Court extending 3rd party defendant's time for answering to June 7, 1948 filed. 5/19/48 noted and Notice mailed.
June 7, 1948.	Answer of Haenn Ship Ceiling and Refitting Corp., filed.
June 8, 1948.	Stipulation of Counsel amending third-party complaint filed.
Dec. 21, 1948.	Third-party Defendant's Interrogatories to Plaintiff, filed.
Mar. 15, 1949.	Order of Court requiring defendants to supply certain information as to S. S. "Stad Vlaardingen" and granting leave to plaintiff to inspect, etc. filed. 3-16-49 noted and notice mailed.
July 25, 1949.	Defendant's notice of taking deposition of third-party defendant et al, filed.
July 27, 1949.	Defendants notice of taking depositions, filed.
Aug. 22, 1949.	Defendants notice of taking depositions, filed.
Oct. 5, 1949.	Petition to penalize defendant for failure to make discovery, filed.
Oct. 18, 1949.	Defendants' answer to petition to penalize defendant for failure to make discovery, filed.
Oct. 26, 1949.	Hearing sur petition to penalize defendant (Order to be submitted).
Oct. 31, 1949.	Interrogatories by Halcyon Lines to plaintiff filed.
Nov. 1, 1949.	Transcript of statement by the Court limiting proof.

Nov. 3, 1949. Notice by 3rd party defendant of taking deposition of A. Millard, filed.

Nov. 7, 1949. Plaintiff's notice of taking deposition of Custodian of records of Jewish Hospital, Philadelphia, Pa., filed.

Nov. 16, 1949. Order of Court permitting physical examination of plaintiff filed. 11-17-49 noted and notice mailed.

Nov. 21, 1949. Jury called and sworn. Alternate jurors sworn.

Nov. 21, 1949. In open Court: Parties stipulate that judgment be entered in favor of plaintiff and against defendants in sum of $65,000. and that trial proceed on the issue between original defendants and 3rd party defendant.

Nov. 21, 1949. Judgment in favor of plaintiff in sum of $65,000 and against Halcyon Lines, Vinke and Company, filed 11/22/49 Noted and notice mailed.

Nov. 21, 1949. Trial on 3rd party complaint. Witness sworn.

Nov. 22, 1949. Trial resumed.

Nov. 28, 1949. Trial resumed.

Nov. 28, 1949. Verdict: The jury renders a special verdict and answers certain interrogatories (see minutes).

Dec. 1, 1949. Hearing on motion for judgment on the verdict.

Dec. 8, 1949. Motion by 3rd party defendant for judgment n. o. v.; for a new trial; and for molding the verdict filed.

Dec. 20, 1949. Testimony filed. (1 vol.)

Dec. 20, 1949.	Depositions of Laurens Westerhoff et al. filed.
Dec. 20, 1949.	Deposition of P. Pronker filed.
Dec. 20, 1949.	Third-party plaintiff's request for charge filed.
Dec. 20, 1949.	Third-party defendant's points for charge filed.
Dec. 27, 1949.	Testimony filed (1 vol.—11/28/49).
Jan. 5, 1950.	Order to mark judgment in favor of plaintiff and against Halcyon Lines, Vinke & Co., satisfied, filed.
Jan. 5, 1950.	In accordance with order filed judgment in favor of plaintiff is marked satisfied. Attest: Gilbert W. Ludwig Deputy Clerk.
Feb. 8, 1950.	Hearing sur motion of Halcyon Lines for judgment n. o. v.; for a new trial; and for the molding of the verdict. c. a. v.
Apr. 3, 1950.	Opinion, McGranery, J., sur motion of 3rd party defendant for judgment n. o. v. or for a new trial and directing entry of judgment filed.
Apr. 3, 1950.	Order of Court denying 3rd party defendant's motion for judgment n. o. v. and for a new trial and directing entry of judgment filed. 4/4/50 noted and notice given.
Apr. 3, 1950.	Judgment in favor of 3rd party plaintiffs and against 3rd party defendant in sum of $32,500, filed. 4/4/50 Noted and notice mailed.
May 2, 1950.	Notice of Appeal by Halcyon Lines and Vinke & Co., defendants, filed. 5/3/50 Copy to Krusen, Evans & Shaw, Esqs.

May 2, 1950. Copy of Clerk's notice to U. S. Court of Appeals, filed.

May 2, 1950. Notice of Appeal by Haenn Ship Ceiling and Refitting Corp., 3rd party defendant, filed. 5/3/50 Copy to Rawle & Henderson, Esqs.

May 2, 1950. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

May 8, 1950. Stipulation of counsel fixing amount of supersedeas bond in sum of $8,000. filed.

May 9, 1950. Supersedeas bond of Haenn Ship Ceiling and Refitting Corp. in sum of $8,000. with Aetna Casualty & Surety Co. surety, and Order of Court approving same filed. 5/10/50 noted.

COMPLAINT.

Plaintiff, SALVADORE BACCILE, claims of the above named defendants the sum of Two Hundred Thousand ($200,000.00) Dollars with lawful interest thereon, upon a cause of action whereof the following is a true statement:

1. Plaintiff is a resident of the City of Philadelphia and a citizen of the Commonwealth of Pennsylvania.

2. Defendants, HALCYON LINES (HALCYON LIJN) and VINKE AND COMPANY, are foreign corporations existing under and by virtue of the laws of The Netherlands.

3. At all times mentioned herein, plaintiff was in the employ of HAENN SHIP CEILING AND REFITTING COMPANY, in the capacity of longshoreman.

4. Upon information and belief, plaintiff avers that at all times mentioned herein defendants owned, operated and controlled the vessel "Stad Vlaardingen" in foreign commerce.

5. At all times hereinafter mentioned, the Haenn Ship Ceiling and Refitting Company was engaged and authorized to perform work aboard said vessel.

6. On or about the 25th day of November, 1946, plaintiff, in company with other longshoremen, was assigned to work aboard the "Stad Vlaardingen", which was then in navigable waters of the United States and was moored to Girard Point dock in the City of Philadelphia, Pennsylvania.

7. On or about the 25th day of November, 1946, at or about 4:30 P. M., plaintiff, in the course of his employment, was working in the feeder in the number two hatch when the floor plank upon which he was working gave way, precipitating him into the hold below and causing the injuries hereinafter more specifically set forth.

8. Disregarding their duties in the premises, defendants, by their agents, servants, workmen and employees, were negligent and the vessel was unseaworthy in the following respects:

(a) failing to provide a reasonable and safe place for plaintiff to perform his duties;

(b) failing to provide proper and adequate equipment for the safe performance of work;

(c) failing to provide a safe and adequate floor planking and other safety devices for the proper performance of the work;

(d) providing a dangerous and unseaworthy floor plank under the circumstances;

(e) allowing said floor plank to become loosened, insecure and otherwise unsafe;

(f) failing to adequately inspect the said floor plank to determine the existence of any unsafe conditions;

(g) failing to provide plaintiff with a safe and seaworthy vessel and safe appurtenances and to keep same in a seaworthy condition;

(h) permitting plaintiff to work on the vessel without warning him of the unsafe and dangerous condition;

(i) otherwise failing to use due care under the circumstances.

9. Solely by reason of the negligence of defendants and unseaworthiness of the vessel, plaintiff fell as aforesaid; he suffered a severe shock and injury to his nervous system; he suffered multiple contusions, bruises, sprains and strains over his entire body, multiple comminuted and displaced fractures and demineralization of the bones of his spinal column, pelvis, legs and feet, paralysis of his lower trunk and lower extremities and loss of vital body functions; he

suffered a comminuted fracture of the first lumbar vertebra, narrowing of the apophyseal joints and impingement of the spinal cord with narrowing of the intervertebral spaces; he suffered a comminuted displaced fracture of the lower one-third of the right tibia, with one and one-quarter inches shortening, fractures of the internal, external and posterior malleoli of the right tibia; derangement of the joint space and decalcification of the lower right tibia; he suffered comminuted fracture of the right ankle, fracture of the oscalcis of the right foot, demineralization of all the bones of the right ankle, and foot, distortion of the mortise of the right ankle and traumatic arthritis of the right ankle and subastragalar joint; he suffered comminuted fracture of the cuboid and scaphoid bones of the left foot, comminuted fracture of the oscalcis of the left foot with free fragments in the soft tissue, a comminuted fracture of the left external and medial malleoli, general demineralization of all bones of the left foot and traumatic arthritis of the left subastragalar joint; he suffered kyphosis of the spine, right glúteo-femoral ulcer, pressure neurosis and trophic ulcer of the right heel and injury to the cauda equina; he suffered a lesion to the conus medullaris, injury to the sacral nerve fibers, paralysis of the lower rectum, anal sphincter and bladder, analgesia and anaesthesia of the perineum, scrotum, penis and soles of the feet and urinary and bowel retention; he has required constant catheterization; he has suffered paralysis of urinary function and urinary continence and has had to wear a rubber bladder; he has suffered lack of urinary and bowel control and sensation; he has suffered hemorrhoids; he has suffered lack of sexual sensation, loss of sexual power and sexual impotence; his back and spine and all the surrounding musculature were fractured, sprained and otherwise injured; his nerves and nervous system have been seriously impaired; he has suffered excruciating and agonizing aches, pains, mental anguish, shock and ability; he has had to undergo numerous surgical operations; he has had to wear a body cast and

leg and foot cast; he has had to wear a body brace; he has been unable to assume his usual duties and occupation for a long period of time in the past and upon information believes and, therefore, avers that his injuries have become permanent, and that he will have to undergo numerous surgical operations and that he will be permanently disabled from performing his usual duties and occupation in the future; he has in the past been and will in the future be compelled to expend large sums of money for medicine, medical care, surgery and treatment.

WHEREFORE, SALVADORE BACCILE claims the sum of Two Hundred Thousand ($200,000.00) Dollars and brings this action to recover same from defendants.

FREEDMAN, LANDY AND LORRY,

By

/s/ MARTIN J. VIGDERMAN,

Attorneys for Plaintiff.

ANSWER TO COMPLAINT.

The answer of HALCYON LINES (HALCYON LIJN) and VINKE AND COMPANY, defendants, by their attorneys, to the complaint of SALVADORE BACCILE, plaintiff, respectfully shows to this Honorable Court upon information and belief as follows:

FIRST DEFENSE.

Defendants admit the allegations contained in paragraphs 1; 2, 4, and 5 of the complaint; admit that on or about the 25th day of November, 1946, the "Stad Vlaardingen" was in navigable waters of the United States and was moored to Girard Point dock, Philadelphia, Pennsylvania, as alleged in paragraph 6, but defendants are without knowledge or means of information sufficient to determine whether plaintiff was in the employ of Haenn Ship Ceiling and Refitting Company or had been assigned to work aboard said vessel on that date as alleged in paragraphs 3 and 6, and they deny that plaintiff was a longshoreman at such time, as alleged in the said paragraphs; defendants are without knowledge or means of information sufficient to determine the truth of the allegations contained in paragraphs 7 and 9, and the same are accordingly denied and strict proof thereof is demanded; and each and every other allegation of the complaint is hereby specifically denied.

Further answering, defendants deny that they, or their agents, servants, workmen and employees were negligent, or that the vessel was unseaworthy, as alleged in paragraph 8 of the complaint. On the contrary they aver that they provided a customary, reasonable safe and proper place for plaintiff to perform his duties; that they provided usual, proper and adequate equipment for the safe performance of work; that they provided normal, customary, safe and adequate floor planking and all necessary and customary safety devices for the proper performance of the work; that to the best of their knowledge, information and belief there was no dangerous or unseaworthy floor plank in the feeder in the number two hatch at any material time, and that

all such planks were maintained in a safe, customary and proper condition and were not allowed to become loosened, insecure or otherwise unsafe; that such planks were duly and adequately inspected to determine the existence of any unsafe condition; that they provided and maintained a safe and seaworthy vessel, being properly manned, equipped and supplied at all material times; and that defendants have no knowledge of any unsafe or dangerous condition existing on board the said vessel at any material time of which warning should or could have been given to plaintiff, and they hereby specifically deny that any such condition existed.

SECOND DEFENSE.

As a further and separate defense, defendants aver upon information and belief that plaintiff voluntarily assumed the risks of his employment as a ship fitter and carpenter, and that his alleged injury was due to the normal and expected hazards of his occupation and the duties which he was engaged in performing at the time of the alleged accident.

THIRD DEFENSE.

As a further and separate defense, defendants aver upon information and belief that the alleged accident was due at least in part to the negligence of plaintiff in failing to exercise due, proper and reasonable care in the performance of his duties, particularly in respect to the following:

(a) By failing to observe the alleged unsafe condition of the plank;

(b) By failing to test the said plank in order to determine its alleged defective condition before using the same;

(c) By failing to provide or require sufficient light to make reasonable and adequate examination of the

said plank in order to determine its alleged defective condition;

(d) By placing an unusual and excessive strain on said planking, and

(e) In other respects to be shown at the trial.

RAWLE & HENDERSON,

By /s/ JOSEPH W. HENDERSON,
Attorneys for Defendants,
1910 Packard Building,
Philadelphia, Pennsylvania.

THIRD-PARTY COMPLAINT.

1. Plaintiff Salvadore Baccile has filed against defendants Halcyon Lines (Halcyon Lijn), Vinke and Company a complaint, a copy of which is hereto attached and marked Exhibit I.

2. Defendants and Third-Party Plaintiffs are foreign corporations duly organized and existing under and by virtue of the laws of the Netherlands, and third-party defendant Haenn Ship Ceiling and Refitting Corporation is stated upon information and belief to be a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania. In addition to diversity of citizenship between the said third-parties plaintiff and defendant, the amount in controversy exceeds the sum of $2,500.00.

3. At all times material to these proceedings, third-party defendant HAENN SHIP CEILING AND REFITTING CORPORATION was engaged in business at Schuylkill Avenue below Magazine Lane, Philadelphia, Penna., and was engaged inter alia in the business of constructing and repairing grain fittings on seagoing vessels.

4. On or about November 25, 1946, third-party defendant, at the request of third-party plaintiffs their agents and representatives, undertook to repair certain grain fittings on Steamship STAD VLAARDINGEN, which vessel was owned and operated by third-party plaintiffs, and was located at Girard Point pier, Schuylkill River, Philadelphia, Penna.

5. Third-party defendant was in full charge and control of the manner and means conducting the aforesaid repairs to the grain fittings on Steamship STAD VLAARDINGEN, and through its agents, servants and employees took possession of the necessary holds where the said repairs were to be made by 1:30 P. M. on November 25, 1946 and placed its own employees in the said holds to conduct the work, and supplied its own lumber and materials in and about the said operation.

6. According to the Complaint filed herein, being Exhibit I annexed to the present petition, plaintiff was a workman employed by third-party defendant on the said repair operation, and it was alleged that the plaintiff was injured about 4:30 P. M. on November 25, 1946, in the course of his employment by third-party defendant while working in the grain feeder in the No. 2 hatch when the floor plank upon which he was working gave way precipitating him into the hold below, and causing the injuries for which the suit was brought. Defendants and third-party plaintiffs have filed an answer to the said Complaint denying liability to the plaintiff for the said injuries, a true and correct copy of which answer is annexed hereto and made a part hereof and marked Exhibit II.

7. Third-party plaintiffs aver that the aforesaid accident and occurrence was not due to any negligence on the part of the said third-party defendants, their agents, servants or employees or to any unseaworthiness of the vessel or negligence on the part of any persons in charge of the said vessel, but aver that the said accident and occurrence was due solely or in major part to the negligence and carelessness of the third-party defendant, its agents, servants and employees, alone or in combination with the contributory negligence of the plaintiff, in the following respects, to wit:

a. the work was in charge of incompetent persons;

b. the foreman and other employees of third-party defendant failed to take reasonable and proper precautions in the construction and use of the staging upon which plaintiff was working at the time of the said accident;

c. the foreman and other employees of the third-party defendant in charge and control of the work failed and neglected to make necessary and adequate inspections of the staging which is alleged to have caused the accident;

d. the said staging was weakened prior to its use by the plaintiff through the negligent acts of the employees of the third-party defendant.

e. the said staging was subjected by the employees of the third-party defendant to an unusual and excessive strain under the circumstances;

f. the employees of the third-party defendant failed and neglected to provide the necessary safeguards to prevent plaintiff from falling into the hold if the staging failed to support him.

g. the employees of the third-party defendant failed to take reasonable and necessary means to provide for the plaintiff's reasonable safety under the circumstances;

h. in other respects to be shown at the trial.

8. By reason of the aforesaid fault and negligence of the third-party defendant, its agents, servants and employees, the same is liable over by way of indemnity to defendants and third-party plaintiffs for any and all sums which defendants and third-party plaintiffs may be found at the trial to be liable to the plaintiff in the present action between plaintiff and defendants.

WHEREFORE, defendants HALCYON LINES (HALCYON LIJN), VINKE AND COMPANY demand judgment against third-party defendant HAENN SHIP CEILING AND REFITTING CORPORATION for all sums that may be adjudged against the aforesaid defendants in suit of the plaintiff herein.

RAWLE & HENDERSON,

By JOSEPH W. HENDERSON,
Attorneys for Halcyon Lines (Halcyon Lijn), Vinke and Company,
1910 Packard Building,
Philadelphia, Pa.

STIPULATION OF COUNSEL.

AND NOW, to wit, this day of May, 1948, it is stipulated and agreed by and between Rawle & Henderson, attorneys for third-party plaintiffs, and Krusen, Evans & Shaw, attorneys for third-party defendant, that the third-party complaint filed in these proceedings may be, and the same is hereby amended to read as follows, with the same force and effect as though originally set forth in the said complaint beginning at Paragraph 8 thereof, to wit:

"8. By reason of the aforesaid fault and negligence of the third-party defendant, its agents, servants and employees, said third-party defendant is jointly liable with third-party plaintiff for, and should be required to contribute to the payment of, any and all damages adjudged to the plaintiff in these proceedings.

"WHEREFORE, defendants and third-party plaintiffs HALCYON LINES (HALCYON LIJN) and VINKE AND COMPANY demand contribution from third-party defendant HAENN SHIP CLEANING AND REFITTING CORPORATION, in the event that the said parties are found to be jointly negligent in the premises, the existence of such negligence on the part of the said defendants and third-party plaintiffs being hereby expressly denied."

RAWLE & HENDERSON,

By /s/ JOSEPH W. HENDERSON,
Attorneys for Defendant and Third-Party Plaintiffs.

KRUSEN, EVANS & SHAW,

By /s/ T. E. BYRNE, JR.,
Attorneys for Third-Party Defendant.

ANSWER.

The Answer of Haenn Ship Ceiling and Refitting Corporation, Third-Party Defendant, to the Third-Party Complaint of Halcyon Lines (Halcyon Lijn) and Vinke and Company, as amended by the stipulation of counsel, respectfully alleges, upon information and belief, as follows:

1. Admitted. The Third-Party Defendant admits that the Plaintiff has filed a suit against the Original Defendant.

2. The Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, admits the averments of the second paragraph of the Complaint but it denies that there is diversity of citizenship between the Plaintiff and the Third-Party Defendant.

3. Admitted.

4. Admitted.

5. The Third-Party Defendant denies the averments of the fifth paragraph of the Complaint as stated. It admits that it supplied lumber and material in connection with the repair of certain fittings on board the Steamship "Stad Vlaardingen" and that its servants, workmen and employees were to perform the said work on board the said vessel. It denies the remaining averments of the fifth paragraph of the Complaint and demands proof thereof.

6. The Third-Party Defendant admits that the Plaintiff, Salvadore Baccile, was a workman employed by it in connection with the repairs to be made on board the Steamship "Stad Vlaardingen". It admits that the Complaint filed on behalf of the said Salvadore Baccile alleges that the Plaintiff was injured at or about 4:30 P. M. on November 25th, 1946 in the course of his employment while working in the grain feeder of the #2 hatch when a floor plank upon which he was working gave way precipitating him into the hold below and causing injuries for which the suit of the said Salvadore Baccile has been brought against the

Original Defendant. The Third-Party Defendant further admits that the Original Defendant and Third-Party Plaintiff has filed an Answer to the Complaint of Salvadore Baccile in which the Defendant and Third-Party Plaintiff denies liability to the Plaintiff for his injuries. The Third-Party Defendant further admits that Exhibit #1 is a true and correct copy of the Complaint filed on behalf of the said Salvadore Baccile and that Exhibit #2 is a true and correct copy of the Answer to the Complaint filed on behalf of the Original Defendants and Third-Party Plaintiffs.

7. Denied. The Third-Party Defendant denies the averments of the Third Party Complaint including the subsections lettered "a" to "h" inclusive.

8. Denied. The Third-Party Defendant denies the averments of the eighth paragraph of the Complaint, both the averments as originally filed and as amended by stipulation of counsel.

SECOND DEFENSE.

The Plaintiff herein, Salvadore Baccile, at the time and place referred to in the Complaint and Third-Party Complaint, was an employee of the Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation. His said injury occurred during the course of his employment upon the navigable waters of the United States and under circumstances where recovery for his disability against the Third-Party Defendant may not validly be provided by State Law. The Third-Party Defendant accordingly avers that as between itself and the Plaintiff, Salvadore Baccile, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, were applicable and that § 5 of the said Act provides in part that the liability of an employer shall be exclusive and in place of all other liability of such employer to the Plaintiff or anyone otherwise entitled to recover damages from the said Third-Party Defendant, at law or in Admiralty on account of such injury.

The Third-Party Defendant further avers that it has secured the payment of the compensation provided for in the said Act to the Plaintiff and that the said compensation has been paid according to law. The Third-Party Defendant therefore pleads the provisions of § 5 of the Longshoremen's and Harbor Workers' Compensation Act as a bar to the within action.

THIRD DEFENSE.

If the Plaintiff was injured as the result of negligence, which the Third-Party Defendant denies, then his injuries were the result of the negligence of the Plaintiff or of other persons for whose actions the Third-Party Defendant would not be responsible. The Third-Party Defendant denies that the Plaintiff sustained injuries through any negligence of the Third-Party Defendant or any persons for whose acts of omission or commission the Third-Party Defendant would be responsible to the Third-Party Plaintiff.

WHEREFORE, the Third-Party Defendant prays that the Third-Party Complaint shall be dismissed, that it may recover its costs in this proceeding and that it shall have such other and further relief as may seem just to this Honorable Court in the premises.

KRUSEN, EVANS AND SHAW,

By /s/ THOMAS E. BYRNE, JR.,
Attorneys for Third-Party Defendant.

DEFENDANTS' ANSWERS TO INTERROGATORIES.

Defendants make the following answers to the interrogatories propounded by plaintiff:

1. The following information relating to plaintiff's accident has been obtained by defendants and their representatives to date, but insofar as the source thereof is hearsay the defendants do not intend to admit them as facts or be bound thereby:

The accident occurred in the No. 2 hold of Steamship STAD VLAARDINGEN while docked at Girard Point between 4 and 5 P. M. on November 25, 1946. Baccile was engaged in his duties as an employee of Haenn Ship Ceiling & Refitting Corporation, which was employed by the ship to repair the grain fittings in the holds and was in full charge of the manner and means of carrying out that work. Baccile took all his orders from his foreman, Frank Rickert, and Rickert was solely responsible to the superintendent of Haenn Corporation. None of the officers or crew of the ship were present at the time of the accident, and none of them had been in the hold after the grain fitters started their work. In order to make the corners of the grain chute tight to prevent grain working through, Rickert directed Baccile to go down into the chute from the hatch by means of an extension ladder. The upper part of this ladder rested against the hatch coaming and the bottom rested on a plank supported in some way across the lower end of the chute, about 12 to 15 feet below the level of the hatchway. As Baccile went down the ladder, the upper end was steadied by Rickert, standing on the deck at the hatch coaming, but it was not otherwise fastened or held in any way. While Baccile was going down the ladder, or immediately after he got off on the plank, the plank and ladder fell down to the bottom of the hold and he fell with them. The plank and ladder were not part of the ship's equipment but belonged to the independent contractor, Haenn Corporation. The grain fittings and feeder chute were originally installed

in the ship by Wolfe Stevedores, Ltd., Board of Trade Building, Montreal, Canada, between October 12 and 14, 1946, acting as independent contractors.

2. The only witnesses known by defendants to have been present at the scene of the accident when it occurred were Frank Rickert, 2924 North Lambert Street, foreman, and Louis Carberry, 1830 South 2nd Street, carpenter, both of Philadelphia, Penna., and both employed at that time by Haenn Ship Ceiling & Refitting Corporation, Philadelphia, Penna.

Defendants' attorneys have interviewed Rickert and Carberry and hold memoranda relating to those interviews. They were reluctant and evasive and refused to give any signed statements. They also hold statements taken by their correspondent attorneys at Norfolk, Virginia, from Chief Officer, P. Reedeker and Boatswain A. Vander Lee, both of Steamship STAD VLAARDINGEN, and both residing at Vlaardingen, Holland, stating that the said persons did not witness the accident and have no information regarding it except what they were told by others.

3. The statements of Reedeker and Lee were made by persons who were not witnesses of the accident and do not contain any statements of fact regarding the circumstances under which it occurred. They are accordingly outside the scope of this interrogatory.

The memoranda of interviews with Rickert and Carberry, insofar as they set forth the facts related by these witnesses, have been substantially set forth under the answer to Interrogatory 1. Defendants aver that such memoranda are not subject to discovery under Civil Rule 33 without the showing of due cause for their production, and none has been averred or shown. Defendants further aver that said memoranda were made by its attorneys of record after the institution of the present suit, and solely for the purpose of preparing for trial. It is therefore

averred that the said memoranda are outside the proper purpose and scope of interrogatories under Civil Rule 33.

4. None made.

5. None made.

6. This interrogatory is irrelevant and immaterial to the present case, inasmuch as plaintiff was not employed by the vessel as a member of the crew or otherwise, but he was solely employed by Haenn Ship Ceiling & Refitting Corporation as independent contractor. Accordingly there are no such documents and records, except as set forth in the foregoing answers.

RAWLE & HENDERSON,

By .....
Attorneys for Defendant,
1910 Packard Building,
Philadelphia, Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

THOMAS F. MOUNT, being duly sworn according to law, deposes and says that he is a member of the firm of Rawle & Henderson, attorneys for defendants; that he is authorized and directed to make this affidavit on behalf of said defendants; that he has read the foregoing answers to interrogatories and the facts set forth therein are true and correct to the best of his knowledge, information and belief, based upon statements made to him and his agents in the course of preparing for the trial of this suit. The reason that this affidavit is not taken by an officer of the defendants, or either of them, is that said defendants are foreign corporations, neither of which is located within this district or has an officer available for the said purpose.

.....

SWORN TO AND SUBSCRIBED before me this day of February, 1948.

.....

PETITION TO PENALIZE DEFENDANT FOR FAILURE TO MAKE DISCOVERY.

The petition of Salvadore Baccile by his counsel, Messrs. Freedman, Landy and Lorry, respectfully represents:

1. The within suit is based upon a cause of action for damages on account of certain personal injuries sustained by the plaintiff through the alleged negligence of the defendant and the unseaworthiness of its vessel.

2. Plaintiff filed a series of interrogatories on December 17, 1947 calling for the disclosure of all facts known to the defendant in connection with the lawsuit and required further the identification of each and every witness who had been interviewed and the identity of each and every report and statement rendered by all such persons. Defendant filed its answers on February 25, 1948 in which it disclosed certain information allegedly obtained from two witnesses named Rickert and Carberry. Defendant, in its answers to interrogatories, disclosed further that it had caused certain other witnesses to be interrogated, Chief Officer P. Reedeker, and Boatswain A. Van der Lee, who, according to the answers to interrogatories, had no information regarding the accident other than what was told to them by other persons; that written statements were taken of these two witnesses which did not contain any statements of fact regarding the circumstances under which the accident occurred. No other witnesses were identified and it was represented in the answers to the interrogatories that the information disclosed represented all the information in the knowledge and possession of the defendant. On March 15, 1948 plaintiff by his counsel filed a motion for production of documents under Rule 34 calling inter alia for the production of the statements of all witnesses and an order of court was entered on the said date requiring such production. Pursuant to the said order the defendants pro-

duced a statement of Laurens Westerhoff, but failed to produce the statements of Reedeker and Lee.

On July 29, 1949 defendant took the depositions in the port of Philadelphia of three witnesses, Laurens Westerhoff, Pieter Reedeker, and Arie Van der Lee, each of whom gave important testimony with respect to the circumstances surrounding the accident, and each testified that he had previously signed a written statement during the year 1947, before the answers to interrogatories were filed, all of which statements were in the possession and custody of the defendant.

The testimony rendered by these three witnesses was in complete variance with the information furnished in the answers to the interrogatories filed under Rule 33 and represented a new defense not previously pleaded. The information which these witnesses disclosed and which had been known to the defendant for a long period of time prior to the filing of the answers to interrogatories by the defendant had never been furnished to the plaintiff as the defendant under the rules of court had been required to do. The defendant thus willfully withheld relevant information from the plaintiff and furnished instead misleading data in its answers to interrogatories. Moreover, the defendant violated the order of court requiring the production of all of the statements by failing to produce the statements of Reedeker and Lee.

3. On August 29, 1949 the defendant took the deposition of another witness, Pieter Pronker, who testified that he was an eye-witness to the accident and rendered a detailed account of the accident and all of the surrounding circumstances, none of which testimony or information was disclosed in the answers to interrogatories, nor was this witness identified or referred to in any part of the answers to the interrogatories or elsewhere. Several days prior to the date when the deposition of this witness was scheduled, plaintiff inquired whether this witness had made any state-

ment and was advised that the witness had rendered a statement in Holland-Dutch which had not been made available to defendant's counsel but that counsel had a translation of a statement dated June 13, 1949. A copy of this translation was furnished to plaintiff's counsel several days before the deposition was taken. This statement was in complete contradiction with all of the information previously furnished in the answers to the interrogatories. It alleged that this prospective witness was an eye-witness to the accident and gave considerable detail with respect to the accident and surrounding circumstances, none of which had been previously disclosed and all of which was in complete contradiction to the answers to interrogatories as well as to the averments in the answer to complaint. In the course of cross-examination the witness produced a copy of his statement in Holland-Dutch which was dated November 15, 1947 and which, according to the testimony of the witness, was not correctly translated in the copy furnished to plaintiff's counsel. Plaintiff's counsel was unable to translate the statement and accordingly was seriously handicapped in his cross-examination of this witness.

4. The defendant thus clearly violated the rules of discovery by failing to disclose the information contained in the several statements heretofore set forth, by failing to identify the several witnesses and the statements which had been rendered, thus misleading the plaintiff as above stated, particularly since the information testified to by these witnesses presents a departure from the defendant's pleaded defense; and by failing to produce the statements as required by the order of court.

5. As a consequence of the highly improper action of the defendant, the plaintiff has been prejudiced in the examination of the witnesses and in the preparation of his case, and has been irreparably damaged.

WHEREFORE, plaintiff prays your Honorable Court for an order under Rule 37 of the Federal Rules of Civil Procedure entering judgment against the defendant and in favor of the plaintiff on the question of liability or in the alternative, that the defendant be precluded from offering any evidence with respect to the unseaworthiness of the vessel or the negligence of the defendant in causing the plaintiff's injuries; and that the trial of the case be limited to the question of damages.

FREEDMAN, LANDY AND LORRY,

By /s/ ABRAHAM E. FREEDMAN,
Attorneys for Plaintiff.

DEFENDANT'S ANSWER TO PETITION TO PENALIZE DEFENDANT FOR FAILURE TO MAKE DISCOVERY.

The answer of HALCYON LINES, a corporation, and VINKE AND COMPANY, defendants, by their attorneys, to the petition of SALVADORE BACCILE, plaintiff, to penalize defendant (sic) for failure to make discovery, respectfully shows to this Honorable Court as follows:

1. Admitted.

2. Defendants admit that said interrogatories were filed and that certain information obtained from alleged witnesses Rickert and Carberry was set forth in the answers, as alleged. Defendants further admit that the answers disclosed statements in the possession of defendants' attorneys, made by Chief Officer P. Reedeker and Boatswain A. Van der Lee at Norfolk, Virginia, which were not annexed to the answers to interrogatories for the reason, as stated therein, that the said persons were not eyewitnesses of the accident. Defendants aver that the statement of Reedeker stated, inter alia, as follows:

> "I did not witness the accident of Baccille and for this reason cannot give you any facts concerning just how it happened, however, I will attempt to tell you just how the ship was fitted out for grain carrying and the conditions under which the contractor who was repairing the fittings in Philadelphia in November, 1946, was working."

The said statement proceeds with a general description of the itinerary of the vessel prior to the accident, when and by whom the feeder was installed, the general scope of repairs ordered at Philadelphia, the general activities of the crew on the day of the accident, and what he observed in the hold after the accident occurred. He also gave a general description of the appearance of the feeder, without particular reference to conditions at the time of the accident

because he states that he had nothing to do with the work of the grain fitters and was in another part of the ship.

The statement of Van der Lee stated, inter alia, as follows:

> "I did not witness the accident at which time a man by the name of Baecille was hurt on the vessel in the latter part of November, 1946, and for this reason can only give you what I know about the work being done by the independent contractor and what I learned concerning the accident after it happened."

The said statement proceeds with a general description of the previous itinerary, when and where the grain fittings were installed, the work around ship being done by the crew on the day of the accident which involved nothing in connection with the work of the grain fitters except opening the hatches before they began work, and what he saw in the hold after the accident.

The substance of the factual information contained in the aforesaid statements was set forth in the defendant's answer to Interrogatory No. 1. Defendants admit that it was represented in the answers that the information disclosed represented all the information in their knowledge and possession, and they presently aver that no other information was then available.

Defendants admit that on March 15, 1948, this court entered an order requiring them to produce certain documents wtihin 45 days thereafter, under Rule 34. Paragraph 5 of the order refers to "all written statements, reports or records, including log entries, obtained from or submitted by members of the crew, or other persons employed on or about the vessel pertaining to the alleged accident plaintiff sustained on or about November 25, 1946." There was no specific reference to the statements of Reedeker or Van der Lee, although plaintiff's attorneys were aware of their existence.

Defendants aver that following the verification of the answers to interrogatories on February 25, 1948, their attorneys obtained a statement from Laurents Westerhoff, boatswain, formerly an able seaman, on March 31, 1948, and a copy of the pertinent log entries. The Westerhoff statement described the interior arrangements of the feeder in detail as he last saw them a few days before the accident, and contained information sufficiently specific to be relevant and material to the actual condition of the feeder at the time of the accident.

Defendants admit that they furnished plaintiff's attorneys with the said Westerhoff statement, together with other documents covered by the order, but did not include the Reedeker and Van der Lee statements for the reasons previously set forth, on the ground that the same did not constitute statements of eye-witnesses, and for the further reason that in the premises plaintiff could not be prejudiced in the preparation of his case by failure to produce them, and by reason of the absence of due cause shown for production of these particular statements, and absence of any specific demand for them in the petition and order.

Defendants admit that Westerhoff, Reedeker and Van der Lee gave testimony by deposition on July 29, 1949, and that each of them testified regarding the statements abovementioned, all of which were fully known to plaintiff's attorneys for a considerable period of time prior to the depositions, as above set forth. Defendants deny that said testimony was in variance with their statements or the information regarding the same set forth in the answers to interrogatories. The petition does not specify the "new defense not previously pleaded" which is alleged to have been represented in this testimony, but defendant denies that any such new defense was intended or involved.

Defendants further aver that the statement of Westerhoff was furnished to plaintiff's attorneys on June 7, 1948. They further aver that plaintiff's attorneys, having full knowledge of the existence of the Reedeker and Van der

Lee statements at that time, made no specific demand for the same until the depositions were taken.

Defendants further aver that the Reedeker and Van der Lee statements were produced at the time of the depositions upon the specific demand of the plaintiff's attorney, while the said witnesses were present and available for cross-examination in respect to any matter contained in the statements, and defendants aver that plaintiff's attorney thereupon subjected them to cross-examination.

Defendants deny that they or their attorneys have at any time wilfully withheld relevant information from the plaintiff, or furnished misleading data in their answers to interrogatories. They further deny that they have violated the order of court requiring production of documents, for the reasons more fully above stated.

3. Defendants admit that on August 29, 1949, they took the deposition of another witness, Pieter Pronker, who testified that he was an eye-witness to the accident and rendered a detailed account of the accident and the surrounding circumstances. Defendants admit that none of the said information was disclosed in their answers to interrogatories filed in February, 1948. They aver that neither they nor their attorneys had any knowledge of the circumstances as testified by said Pronker when the said answers to interrogatories were filed, nor on June 7, 1948, when their attorneys produced various documents for examination under the order of court.

On the contrary, defendants aver that their first knowledge that said Pronker was an eye-witness and would so testify was on or about June 9, 1949, when in response to an inquiry by defendants said Pronker furnished them with a completed and typewritten statement in Dutch bearing date of 15 November, 1947. A full report regarding this matter, submitted by C. L. van Veen, manager of the freight department of Halcyon Lines at Rotterdam, under oath and dated September 29, 1949, together with the original

statement of Pronker and other papers annexed thereto as received by defendants' attorneys, is attached hereto as Exhibit "A".

Defendants and their attorneys aver that they have acted in good faith with opposing counsel and the court in this matter, and they further aver that in the premises there was no wilful and deliberate lack of disclosure. On the contrary, a copy of the English translation of Pronker's statement was transmitted to plaintiff's attorneys on August 22, 1949, as soon as reasonably possible after its receipt by defendants' attorneys, so that it was known and available to opposing counsel, and produced in translation, a full week before the deposition was taken.

4. Defendants deny that they or their attorneys violated the rules of discovery in the premises, for the reasons fully above set forth. They further deny that they wilfully misled the plaintiff in regard to the pleaded defense by reason of the facts stated, which further show that defendants themselves were unaware of the additional ground for defense supplied by the testimony of said Pronker until early in June, 1949, at Rotterdam.

5. Defendants deny that they have committed any improper action in the premises, and further deny that plaintiff has been prejudiced in the examination of witnesses or in the preparation of his case, and further deny that he has been irreparably damaged. On the contrary, full disclosure has now been made of all matters which are the subject of complaint herein. Plaintiff's only existing complaints must accordingly relate to alleged unwarranted delay in disclosure, which defendants aver was not due to any wilful, deliberate, or unjustified conduct in the premises.

Wherefore, defendants respectfully pray your Honorable Court to dismiss the petition for judgment on the question of liability, or in the alternative for exclusion of defense

evidence relating to the unseaworthiness of the vessel or the negligence of defendants; and on the contrary defendants pray that the action may be permitted to proceed to a full and proper trial on the merits.

RAWLE & HENDERSON,

By .....
Attorneys for Defendants,
1910 Packard Building,
Philadelphia 2, Pennsylvania.

EXHIBIT "A".

The undersigned, Cornelis Leendert van Veen, of van Everdyckstraat 37, Rotterdam, states:

I am manager of the freight department of the Dutch Limited Company Halcyon Lijn of Rotterdam and hold this capacity since more than 10 years. I am fully acquainted with all happenings on the voyages of our steamers reported to our office and of all incoming letters which concern matters of our vessels. So I am aware of what was reported to the Company by the Master of the s.s. "STAD VLAARDINGEN" with regard to the accident which took place November 1946 on board of our vessel to Salvadore Baccile. and the proceedings in connection therewith taken against the Halcyon Lijn.

When the solicitors acting on our behalf at Philadelphia asked us to let them have all particulars and all statements in our possession with regard to the accident, we have sent them all documents or copies thereof which were at our disposition. Amongst these documents sent before February, 1948, was no statement from the second officer of the "Stad Vlaardingen", Mr. Pronker, and neither a copy of such statement.

From the information which has reached us up to that date we had come to the conclusion that there was amongst

the crew of our steamer no eye-witness of the accident and we had informed Messrs. Rawle & Henderson accordingly. When we had an opportunity to have a talk with Captain Kuipers of the "Stad Vlaardingen" in the first half of 1949, we heard from him that Mr. Pronker, second officer, had seen the accident happen and this was a surprise to us, as it was contrary to what we had received till then. As Mr. Pronker was in Holland at that time, we immediately asked him to let us have a full, written statement of what he had seen of the accident. Mr. Pronker asked us to allow him to inspect the file of the case which we had at our office and we accordingly handed this file to him. This was about the beginning of June 1949. Shortly thereafter Mr. Pronker returned the file to us with his letter dated the 8th of June 1949, attached hereto, enclosing a statement signed by him with regard to the accident. This statement was dated November 15th, 1947. We had a translation made and by a clerical error the translated copy bears the date June 13th 1949, being the date on which the translation was made.

We sent this statement to our Protection and Indemnity Association with a letter dated June 22nd 1949, as per copy attached.

I confirm that the above stated facts are in all respects true.

I attach to this statement the original statement signed by Mr. Pronker.

The matter was handled by me personally as set out above.

Rotterdam, September 29th 1949.

C. L. VAN VEEN

KINGDOM OF THE NETHERLANDS,
PROVINCE OF SOUTH HOLLAND,
CITY OF ROTTERDAM,
CONSULATE OF THE UNITED
STATES OF AMERICA,
} *ss.:*

SUBSCRIBED AND SWORN TO by Cornelis Leendert van Veen before me, Charles E. Luckett Jr., Vice Consul of the United States of America in and for the consular district of Rotterdam, Netherlands, duly commissioned and qualified, this twenty-ninth day of September A. D. 1949.

CHARLES E. LUCKETT, JR.
Charles E. Luckett, Jr.
American Vice Consul

(Seal)

American Consulate
American Consulate
$2.00
Rotterdam, Netherlands

Item No. 24
Service No. 28
Fee $2.00 equal to
fl. 1.60 Neth. cy.

Hoorn 15, Terschelling 6-VI-49.

(Stamp)
10 Juni 1949.

Halcyon Lijn N. V.
Afd. Bevrachting.
Veerkade 5. Rotterdam.

Mijne Heren,

Gngesloten doet ondugetekende U. Loekomen:

a Copy Rapport. Aeta Casualty and Surety Company.

b Copy Statement. P. Reedeker.

c Copy Statement. A. van der Lee.

d Verklaring ondugetekende. betreffende on geval. Salvadore Baccile.

Inmiddels verblijvend met de meeste hosgachting lekend lij sich.

(Signature illegible)
15 November 1947

Verklaring van P. Pronker.
1e Stuurman s.s. "STAD ARNHEM"

Onderwerp:
Ongeval Salvadore Baccile.

Ondergetekende oud 37 jaar, geboren te Terschelling op 13 November 1910, sinds 1934 in dienst der Stoomvaart Maatschappij HALCYON LIJN N. V. gevestigd te Rotterdam, Veerkade 5, en thans varend als 1e Stuurman op het s.s. "STAD ARNHEM" toebehorend aan bovengenoemde Maatschappij verklaart hierbij:

dat hij vanaf 25 Mei 1946 t/m 6 Augustus 1947 heeft dienst gedaan als 2e Stuurman op het s.s. "STAD VLAARDINGEN", eveneens toebehorend aan genoemde Rederij.

dat in die tijd genoemd stoomschip op 24/25 November 1946 lag gemeerd in Girard Point Dock voor het innemen van een lading graan.

dat op order van den Gezagvoerder D. Kuipers via den Agent een aannemer was opgedragen de feeders in diverse ruimen te herstellen en te verbeteren.

dat ondergetekende zich op 25 November ten 4u30's namiddags naar de logiezen begaf voor het afgeven van opgevraagd geld aan de stoker W. O. Ededuwa en zag dat enkele werklieden aan B. B. zijde in de feeder van ruim II herstellingswerkzaamheden verrichtten, hierop verder geen acht gevend.

dat hij na enkele ogenblikken terugkerend en ruim II passerend zag dat een ladder die met het boveneind tegen het graanschot rustte en waarop zich een arbeider bevond plotseling iets naar voren weggleed en onmiddellijk hierop in het ruim verdween.

dat hij zag dat deze arbeider voorover op de bovenste graanschoor viel, hierlangs ongeveer 1½ meter schuin weg naar beneden gleed, ee poging deed zich hieraan vast te houden, die mislukte en vervolgens enigszins achterover in het ruim viel en tevens onder het vallen nog in aanraking kwam met de onderste schoor.

dat dit ongeval plaats vond, doordat het slachtoffer staande op de ladder zich te ver zijelings naar voren heeft gebogen waardoor het boveneinde der ladder is gaan verschuiven, de ladder onder nog maar één steunpunt heeft gehad, met het noodlottige gevolg.

dat hij nabij de in het ruim gevallen werkman en ladder een plank zag liggen, en hij eveneens vermeende het geluid van een vallende plank te hebben gehoord, ofschoon hij dit niet heeft gezien en daarom ook niet kan verklaren ook omdat zijn blik was geconcentreerd op de vallende werkman.

dat hij zich onmiddellijk langs de ruimladder naar het slachtoffer Salvadore Baccile, heeft begeven en de toegesnelde arbeiders orders heeft gegeven het slachtoffer wegens denkbare verwondingen aan rug enz. niet te verleggen maar de brancard of te wachten.

dat enige ogenblikken later het slachtoffer op een brancard uit het ruim is gehieuwd voor vervoer naar het hospitaal.

dat hij met de 1e Stuurman P. Reddeker de ladder heeft geinspecteerd waarbij bleek dat het een uitschuifbare was, niet tot de scheepsinventaris behorend, maar door de aannemer in gebruik, en niet de lengte bezat om van de buikdenning tot de feedertop te reiken en dus hoger zijn rustpunt moet hebben gehad.

dat hij niet heeft gezien waarop deze ladder rustte voor het ongeval, doch gezien de lengte deze op een onder in de feeder door de arbeiders aangebrachtte steun moet hebben gestaan.

dat hij alles voorzover dor hem is waargenomen, en hiervoor beschreven, naar waarheid heeft weergegeven.

P. Pronker.

P. Pronker.
1e Stuurman Halcyon Lijn N. V.

22 Juni 1949.

Chart. O. V.
vV/JK.

Messrs. The United Kingdom Mutual
Steam Ship Assurance Ass. Ltd.
Messrs. Thos. R. Miller & Son

24. St. Mary Axe
LONDON E. C. 3.

Dear Sirs,

373/6 s.s. "STAD VLAARDINGEN" re
SALVADORE BACCILE NOVEMBER 1946.

With reference to the above case we beg to inform you that so far we have not yet been able to arrange, that the four witnesses are sailing on board of one of our steamers to the other side.

In the meantime, however, when further discussing this matter it has turned out that the second officer, Mr. P. Pronker, seems to be the only eye-witness in this case and we have therefore taken his statement. As this may be of importance we beg to enclose 2 copies of a free translation of same. We shall be glad to receive your further instructions.

Yours faithfully,

HALCYON LIJN N. V.

Encl.

OPINION.

Philadelphia, Pa., October 26, 1949.

Before Hon. William H. Kirkpatrick, *J.*

Present: Freedman, Landy and Lorry, Esqs., by Abraham E. Freedman, Esq., for the Plaintiff;
Rawle and Henderson, Esq., by Thomas F. Mount, Esq., for Defendant Halcyon Lines.

(After argument.)

The Court: I have heard very full argument in this case and I have read the statements and the affidavits, and I think it is a case which calls for some action to penalize the defendant for failure to make a disclosure which, it appears to me, was called for by all the circumstances of the case. In spite of the argument of counsel for the defendant I do not think anybody can read their answer and get any other idea than that their principal, if not their only, defense is that there was a plank there and that it was in proper shape, and that the plaintiff failed to properly take care of himself when he went on the plank by testing it or looking at it to see whether it was defective. The answer cannot mean anything else.

When the defendant answered the interrogatories he had in his possession two statements which he referred to in the answer to the interrogatories—the statements of two witnesses, Reedeker and Van der Lee. The impression one gets from reading the answer to the interrogatoris is that those witnesses really knew nothing at all of any value to the case, and that is the impression which the plaintiff undoubtedly got because he did not make any particular effort

to compel the production of those statements. It now appears that the statements of these two witnesses, Reedeker and Lee, while they are not statements of eye witnesss, do contain a good deal of matter that is very relevant to the case and to the defense. They contain at least the basis for the defendant's taking the position that there was never a plank there. Practically the same thing can be said in the case of Pronker.

Quite apart from the production of statements of witnesses, the interrogatory called for all the facts relating to the alleged accident, it was a very broad interrogatory, and whether these statements were produced or not, the facts known to the defendant which would give a basis for the defendant's claim that there was no plank there ought to have been disclosed.

I do not think it is a flagrant case, I do not think it is a case that calls for judgment against the defendant or any very severe penalty, but I do thnk that it is a case of the failure of the defendant to meet the requirements of the discovery procedure fully and fairly, and that being so, the only penalty that I will impose is to order that the facts contained in Paragraph 7 of the plaintiff's claim shall be taken as established. Of course, there is no dispute that the plaintiff did have an accident at about that time in the course of his employment, anyhow, so that what the defendant is precluded from is the offering of evidence to show that there was no plank there. This does not preclude the issue of whether or not the plank was part of the ship's equipment from being tried out, whether it was put there by the stevedores or by whom it was put, or what its condition was, or anything of that sort. But it does preclude the defendant from making the point that there was no plank there. I will make an order in that form. There was a plank, the plaintiff was working on it, the plank gave way and he fell into the hold; those facts are to be taken as established.

MR. FREEDMAN: Sir, the fact that the plank was not there and the fact that it was not part of the ship's equipment are both tied up inseparably, sir.

THE COURT: No, I am not going to force the defendant to admit any more than the default calls for, and I do not think it calls for any more than what I have said. It is to be taken as established that there was a plank there, that the plaintiff was working on the plank, and he fell from the plank and was injured.

EXCERPTS FROM TESTIMONY.

[12] **Third-Party Plaintiffs' Evidence.**

DIRK KUIPERS, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION.

By Mr. MOUNT:

* * *

Q. Were you the master of the "Stad Vlaardingen" in November [13] of 1946?

A. Yes.

Q. How long had you been on that vessel as master at that time?

A. Since the beginning of July of that year.

* * *

Q. You carried a cargo of oats from Montreal to Rotterdam in October of 1946, is that right?

A. Yes.

Q. Before taking that cargo in Montreal were grain fittings put in the ship?

A. Yes, sir.

Q. What did the grain fittings consist of?

A. They consisted of shifting boards and feeders.

Q. By whom were they installed in the ship?

A. By Wolfe Stevedoring Company.

Q. Who was Wolfe Stevedoring Company?

A. It is a company for stevedoring and grain feeders.

Q. At Montreal?

A. At Montreal.

Q. When you got to Rotterdam did you discharge the entire cargo that you took at Montreal?

A. Yes.

[14] Q. In the discharging of that cargo were the grain fittings in the vessel damaged?

A. Yes, there was some damage done.

Q. When you finished discharging at Rotterdam and left there did you come directly then to Philadelphia?

A. Yes.

Q. Did you carry any cargo, or did you come in ballast?

A. We came in ballast.

Q. So that when the vessel arrived at Philadelphia her holds were all empty; is that correct?

A. Yes.

Q. During the course of the voyage from Rotterdam to Philadelphia was there any work done in the holds or on the grain fittings by any of your crew?

A. Well, there was work done in the holds, cleaning.

Q. What did that consist of?

A. Well, sweeping the holds of the remains of the cargo of oats.

Q. Were the grain fittings—grain feeders, I mean, cleaned too? Were they cleaned also?

A. Well, the feeders and shifting boards, both of them.

• • •

[15] Q. Captain, after your vessel docked at Philadelphia were you on the deck of your vessel near No. 1 or No. 2 holds?

A. When the ship docked?

Q. After she docked?

A. Well, first of all I was with the Customs officers and Immigration officers in the saloon clearing the ship, clearing the passengers.

Q. Yes. After you got through with all that, what next happened in regard to the ship?

A. Well, sometime during that clearing I was called on deck.

• • •

THE WITNESS: I met the inspector. The grain inspector.

By Mr. Mount:

Q. Do you remember who he was?

[16] A. That was Captain Campbell.

Q. When you went on deck and saw Captain Campbell, was anybody else there?

A. Well, there was some from the contractors there.

Q. When you say "the contractors" you refer to whom?

A. Haenn Company.

Q. Did you have any discussion with Captain Campbell and the representative of the Haenn Company?

A. Well, I did have with Captain Campbell.

Q. At the time you had your discussion with him was the representative of Haenn Company present?

A. I believe so.

Q. What was the discussion about?

A. About building some extra feeders.

Q. Where were they, in which hold?

A. That is No. 2 hold.

Q. In addition to building the extra feeders was there any work to be done in No. 2 hold?

A. Well, the repairs—the repair to the shifting boards or shores—fell down and had to be re-erected.

Q. In other words, when you refer to shores, do you mean these diagonal pieces there?

A. Yes, sir.

* * *

[17] Mr. Mount: * * * Captain, point out to us the shores that you refer to.

The Witness: These (indicating).

* * *

By Mr. Mount:

Q. In addition to fixing those shores what other work was to be done in No. 2 hold, Captain?

A. Burlapping in the feeder had to be nailed again.

Q. Where was that burlap located?

A. Inside the feeder.

Q. Where were the additional grain—you say you were to build additional feeders; is that right?

A. Yes, sir.

Q. Whereabouts were they to be built?

A. Well, in the after end——

Q. Toward the after end of the hatch?

A. Somewhere in the 'tween deck here.

[18] MR. BYRNE: The witness is pointing to a point that is away from the model.

THE WITNESS: Yes, away from the model. The place it is, it should be ahead of the bulkhead.

By MR. MOUNT:

Q. At any rate, the location of the additional feeders was in the 'tween deck, is that right?

A. Yes.

Q. And by the "'tween deck" do you refer to this place here (indicating)?

A. Yes.

Q. Is that all the work that was needed to be done in No. 2?

A. Yes.

Q. When you had this discussion what was decided?

* * *

Q. Was there any discussion as to the nature and the amount of work that was to be done in No. 2, between you, and Captain Campbell, and those present?

A. Not at the time. Our discussion was—my discussion with Captain Campbell was only—this hold, about the extra feeders to be built.

Q. Was there any discussion about the work which was to be done in No. 2 hold, by either Captain Campbell, or the [19] contractors, or yourself?

MR. BYRNE: I object to that, sir. The witness has just said that he had no other discussions, Mr. Mount.

THE COURT: Well, he did say that the burlap was to be nailed in there.

By MR. MOUNT:

Q. Was there any mention made of the other repairs, such as the burlap?

A. Not between me and Captain Campbell.

Q. After this discussion did the Haenn Company come aboard your vessel?

A. Yes, sir.

Q. Did they make repairs to the feeder and the shifting boards?

A. I know they did, but I haven't seen them doing it.

Q. Do you know whether any of your officers superintended that work or not?

A. Well, the chief officer is supposed to do that work.

Q. What does he do about it? What part does he have in connection with it?

A. Well, he has to see to it that everything is done all right.

Q. Do you furnish any of your crew to assist in it?

[20] A. No, sir.

Q. Do you furnish any materials?

A. No, sir.

Q. Who furnished the material and the workmen to do the work?

A. The Haenn Company.

Q. Were you informed by anybody of the manner in which the Haenn Company proposed to perform this work?

MR. BYRNE: I object to that, sir.

* * *

By THE COURT:

Q. First of all, Captain Campbell is what? What is his official position?

A. He is inspector for the underwriters, the Board of Underwriters, and he has to see to it that the grain fittings

and everything comply with the regulations, and that we carry cargo across safe, in a safe way, and that is his job.

Q. After you had gone on deck, and left the saloon, where [21] you were clearing passengers, the Immigration and Customs authorities, you met Captain Campbell?

A. Yes.

Q. What recommendations did Captain Campbell make to you at that time with respect to the situation of the hold, and its possibilities for taking on another cargo of grain?

A. Well, they called me only in connection with the extra feeders that had to be built. The chief officer had been going with Captain Campbell, and, I expect, one of the contractors, around the ship for repairs to be done, but I was called in connection with the extra feeders, about something in No. 1 hold, about the feeder. I had to have a talk with them.

Q. And the accident occurred in number——

A. In that No. 2.

Q. No. 2 hold?

A. Yes, sir.

Q. You said that the burlap in No. 2 had to be nailed?

A. Yes, that was torn down.

Q. How did you know that?

A. Well, I have seen that during the voyage.

Q. You saw that?

A. Yes.

Q. And that was discussed then between you and Captain [22] Campbell about the nailing of the burlap?

A. No, that had been done by the chief officer before me, before I was called.

THE COURT: All right.

By MR. MOUNT:

Q. Captain, what is the purpose of these grain feeders? What is the purpose of their building those in the ship?

A. Well, during the voyage the grain settles down. The purpose of the feeder is to fill up the hold again so the cargo

can't shift over, that there won't be more on one side than on the other side.

Q. Do you use that type of feeder for carrying anything other than grain?

A. No, sir.

Q. When you have finished carrying your cargo of grain what happens to the feeder and the shifting boards?

A. They are taken down.

Q. When you say "they are taken down" do you mean that all of that wooden structure, consisting of the feeder and the shifting boards is taken out of place?

A. Yes, sir.

Q. When that is done does it leave your ship in the same condition as it was before the feeder was put in?

A. Yes.

[23] Q. I call your attention here to a plank, or staging inside the feeder. Are those necessary in order for the feeder to function as a feeder?

A. No, sir.

Q. Do you know of your own knowledge whether any such planks were left in the feeder after it was built in Montreal?

A. I didn't pay any attention to it.

* * *

Q. Captain, if you were on the top deck of the vessel and you found it necessary to send someone into the feeder to do work in there, is there a safe way in which he could get down and do the work in there?

MR. BYRNE: Do not answer that, Captain.

It is asking the Captain for a conclusion. He [24] may ask the Captain to testify to all the facts he wants, but not for a conclusion. That is up to the jury.

MR. MOUNT: I am asking him for his opinion as a qualified master of the vessel and a seafaring man for forty-four years.

THE COURT: I think that is fairly obvious. What would be the objection there, Mr. Byrne?

MR. BYRNE: Sir, the conclusions in this case are for the jury.

THE COURT: That is right.

MR. BYRNE: Not the Captain of the ship, sir.

THE COURT: That is right.

MR. BYRNE: That is the basis of my objection.

THE COURT: What is the custom? Change it to that. What is the custom, in accordance with the Captain's views?

MR. BYRNE: Note my exception.

THE COURT: Overruled, exception granted.

By MR. MOUNT:

Q. Suppose you come to the model and explain to the jury, standing to one side. If you were on this top deck here and you wanted to send a man down into the feeder how would be the customary and safe way to do it?

A. Go down a Jacob's ladder——

[25] Q. Explain just what a Jacob's ladder is.

A. Or a pilot ladder, you might call it, too.

Q. What kind of a ladder is that?

A. That is a rope ladder.

Q. Where could it be made fast?

A. On the fore and aft or on the bolts or rings on the side of the hatch.

Q. And the Jacob's ladder would enable somebody to get down into the feeder, is that right?

A. Yes, sir.

Q. Then what further could he do in order to work down there?

A. They could lower somebody——

MR. BYRNE: I object, or does my objection go to this entire line?

THE COURT: Just a minute. What further could he do in order to make fast the ladder?

MR. MOUNT: No, I mean we were asking him how he would get down there in the first place. He says he would put a Jacob's ladder down, which he could secure over the beams or at the rung.

THE COURT: I followed that. Now your next question.

MR. MOUNT: Now, after the man gets down there [26] and he wants to perform work with the ship's equipment at hand, what could he do to make a safe platform to work on?

THE COURT: I will overrule the objection and grant you an exception.

MR. BYRNE: Will Your Honor grant me an exception to this entire line?

THE COURT: Yes.

MR. BYRNE: And I do not have to speak every time?

THE COURT: No.

MR. MOUNT: Go ahead.

THE WITNESS: He could lower one of the hatches, the main deck hatches, several of them, as many as they wanted, and put them on the fore and afts in the feeder, and make a platform there to work on.

By MR. MOUNT:

Q. And the fore and afts you refer to are these steel beams here (indicating)?

A. The steel beams.

Q. And they are down in the 'tween deck?

A. In the 'tween deck.

Q. At the bottom of the feeder; is that correct?

A. Yes, sir.

Q. Are they part of the ship's permanent structure?

[27] A. Yes, sir.

Q. The hatch covers on the top deck are in three sections; is that right?

A. Yes, sir.

Q. In other words, the width of the hatch is 28 feet, and in the 'tween deck the hatch covers are only in two sections; is that correct?

A. Yes, sir.

Q. In other words, they are 14 feet long in the 'tween deck, whereas here (indicating) they are slightly less than nine feet, is that correct?

A. Well, more than nine feet.

Q. So that the top section hatch covers could be put down in there, you say?

A. Yes, sir.

Q. How could they get them down there?

A. Lower them by a rope.

Q. And after they were put down in there could they be secured?

A. Yes.

Q. How?

A. With lashings around the fore and aft.

Q. Captain, if you put this ladder in the feeder, such as is indicated here, could that ladder be lashed by a rope at [28] the top?

A. Yes.

Q. How?

A. To the fore and aft.

Q. Could it be secured at the bottom—from the bottom, by a rope also?

A. You could only tie rope to it in the bottom and lead up to the deck, but at the bottom it could hardly be secured if there was a board like that on the fore and aft.

Q. Captain, did you have any extension ladders aboard your vessel?

A. No, sir.

MR. BYRNE: May I see the Court at side bar, sir?

THE COURT: Yes, surely.

(The following transpired at side bar:

MR. BYRNE: If the Court please, just so the record is straight, may I ask that the entire examination of this captain starting from the time when I first objected to his opinions, and all the subsequent questions in which he speculates and says what could have been done and what might have been done, may I ask that it be stricken.

THE COURT: If you will indicate what is [29] speculation, I will rule on that. I do not know what it is. I did not observe any particular speculation.

MR. BYRNE: Mr. Mount asked him how you could get down in there. The answer, a Jacob's ladder, it is speculation.

THE COURT: He has been at sea and he is a master, he has a master's license.

MR. BYRNE: All I want to do is to protect my record.

THE COURT: Unless you indicate to me the particular and speeific speculations I will overrule the objection and grant you an exception.

MR. BYRNE: That is true as to the whole line, what could have been done, how the ladder could have been fastened with ropes, that is all speculation.

THE COURT: I will overrule the objection and grant you an exception.

• • •

CROSS-EXAMINATION.

By MR. BYRNE:

Q. Captain, these hatch boards that you told the jury about are boards which fit across this opening? Is that not so? Either the opening at the top deck or the opening at the 'tween deck?

[30] A. Yes.

Q. Captain, those boards are so cut that they fit rather closely, isn't that true?

A. How do you mean, rather closely?

Q. That they must be of a particular length or else they will slip off the little lips that are provided to hold them, isn't that so?

A. Yes.

Q. Captain, did you examine the method by which this particular grain feeder was built?

A. I knew the fore and aft sides were vertical boards, and that is all I know about it.

Q. Directing your attention to the point that I want to make, do you know whether the boards of the feeder came down so that they were inside the coaming at the 'tween deck level?

A. No, that is one thing I don't know.

Q. You don't know?

A. No.

Q. Captain, if I told you that it will be shown in evidence in this case that those boards were three inches thick, and that they came down so that they covered up the lip upon which the hatch boards rested, will you tell me then how you could put a hatch board in that grain feeder?

A. Not the 'tween deck, but the main deck hatch boards.

[31] Q. You couldn't put 'tween deck hatch boards in?

A. Unless it was slanted.

Q. So that it couldn't have been put in level?

A. Not on a level.

Q. You say that one of the nine foot hatch boards could have been lowered in there on a rope, is that right?

A. Yes.

Q. Now, Captain, when you say that one of the main deck hatch boards could have been lowered in on a rope are you assuming that there was nothing at the bottom of that feeder except the steel fore and aft beams?

A. Well, I don't know if there is anything more in

Q. I want to make myself clear. I want to be very fair with you, Captain, but you told Mr. Mount now—you are testifying here for the Court and the jury, and you told Mr. Mount that you could lower a hatch board in there by means of ropes?

A. Yes, sir.

Q. You did?

A. Yes.

Q. Did you mean you could do that if there was nothing there except the steel beams, or that you could do that even if the feeder had those stage planks in there?

A. Well, if the stage planks are in there I even could lower a hatch board down.

[32] Q. You could?

A. In the way they are built in I could lower a hatch board in.

Q. Did you see those stage plankings?

A. Yes, I have seen them. As they are built in here, yes, I have seen them.

Q. You mean in the model?

A. In the model.

Q. Captain, if one of those hatch boards was laid across the beams, like I have laid it on the model, so that it did not have its ends rest on each end on a beam, what would happen if a man stepped on the end of that board?

A. You would have to put lashings around it to prevent it from—what do you call it?

Q. Tipping?

A. Tipping.

Q. Do you know what I mean by a seesaw, Captain? Do the Dutch children use a seesaw, where there is a horse or a support in the middle?

A. Yes, sir, I know.

Q. Would it operate just like that?

A. If you didn't put any lashing on it, yes.

Q. Captain, to put a lashing on it a man would have to walk across this 5-inch steel beam, wouldn't he, and work on it?

[33] A. No, you could put that hatch cover close to the side of the feeder, just underneath the pilot ladder or any means you could get down with, and then start from there and make a whole platform right across the feeder.

Q. I am talking about lashing it, Captain. Let us assume that you put a board down there.

A. Yes.

Q. Lowering it down with ropes.

A. Yes.

Q. And that you have to work all around the inside of that feeder to tack up burlap.

A. Yes.

Q. How would you lash that hatch board? Wouldn't the man have to get—if it is in the position that I have it there, wouldn't he have to walk out there, and then reach down to put his rope underneath that beam; that is the only way he could lash it, isn't it?

A. No, he could sit on it.

Q. He could what?

A. He could sit on it.

Q. But he would have to work on that little narrow beam, wouldn't he?

A. Well, he could put two down or three down before he started lashing and before he made it safe to go anywhere in [34] a corner.

Q. Captain, you testified that you knew that damage had been done to this feeder during the discharging operation at Rotterdam. That is what you said earlier, isn't it?

A. Damage to the feeder? I only know this feeder, that is, the burlap was torn down, or torn in some places.

Q. But you did testify I thought that there had been damage done generally at Montreal, not just the burlap. If I misunderstood you I want you to tell me.

MR. MOUNT: You mean at Rotterdam, do you not?

MR. BYRNE: Yes, I certainly mean Rotterdam. If I said something else it was my mistake.

THE WITNESS: Some other feeders—it seems that one other feeder had some boards missing.

By MR. BYRNE:

Q. Captain, my next question to you is, when you talked to the man from the Haenn Company did you warn him of this damage?

A. As I said, the chief officer being around with the inspector, Mr. Campbell, and one of Haenn Company before I got on deck.

Q. Well, my question was, did you warn him yourself? Did you warn him?

A. Before I entered port I sent a telegram to Levino's.

MR. BYRNE: I must ask that the answer be stricken, sir.

[35] You will have to answer me either yes, you did, Captain, or no, you didn't. Then if you want to explain it, sir, you may.

THE WITNESS: What was the question again?

By MR. BYRNE:

Q. Did you warn the man from the Haenn Company, when he was on the ship in the morning before the men started to work, that these feeders had been damaged when you discharged your grain at Rotterdam?

A. I didn't warn him.

Q. You did not?

A. No.

Q. Do you know whether your chief officer did?

A. I don't know if he warned him.

Q. Captain, the work of building the so-called wing feeders, that did not have anything to do with the main feeder at the No. 2 hatch, did it?

A. No, sir.

Q. That was a completely separate proposition?

A. Yes.

Q. As a matter of fact, that work was to be done in the 'tween deck some—I don't know what it was, what would it be, twenty or thirty feet away from the main hatch altogether?

A. No, about ten feet.

[36] Q. Ten feet? How far would that be away from the main feeder?

A. Over twenty feet.

Q. When did you leave the ship on the day of the 25th, Captain, do you remember?

A. No, sir.

Q. Were you on board when this accident happened?

A. No, sir.

Q. Captain, this feeder that was built at Montreal, Mr. Mount asked you if it would be taken down when you finished carrying grain, and I believe you said, yes, it would; that is right, isn't it?

A. Yes, sir.

* * *

By Mr. Byrne:

Q. Captain, since you were going to continue to carry grain you were going to use that same feeder, were you not?

A. Well, we hoped so.

Q. The Haenn Company, Captain, was to do the work of [37] refitting those feeders so that they would meet the requirements of Captain Campbell, isn't that true?

A. Yes.

Q. And Captain Campbell didn't work for Haenn, did he?

A. I don't think so.

Q. So far as you knew he represented the New York Board of Underwriters?

A. Yes.

Q. I believe you testified that all that needed to be done in the No. 2 feeder was that the burlap was to be nailed; is that what you said?

A. I believe so.

MR. BYRNE: That is all.

RE-DIRECT EXAMINATION.

By MR. MOUNT:

Q. Well, Captain, you would use these same fittings over again if you knew you were going to take another cargo of grain of some sort, wouldn't you?

A. Yes.

Q. Whether or not they could be used would depend upon the regulations of the particular port where you were going to load, would it not?

A. Yes.

Q. And you would have to make them comply with the [38] regulations of that particular country, would you not?

A. Yes.

* * *

WILLIAM T. DEWITT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. MOUNT:

Q. Mr. DeWitt, what is your occupation?

A. Manager of the Operating Department, Lavino Shipping Company.

Q. In November, 1946, was Lavino Shipping Company the agents for the steamship "Stad Vlaardingen"?

A. Yes.

Q. Were any arrangements made with the Haenn Ship Ceiling and Refitting Corporation?

A. Yes.

Q. What were the arrangements made?

A. We called the Haenn Ship Ceiling and Refitting Corporation and requested that they have a man go aboard the "Stad Vlaardingen" when she arrived and meet the

master, or chief [39] officer, and Captain Campbell of the Board of Underwriters.

Q. Who is Captain Campbell?

A. He is the chief surveyor for the New York Board of Underwriters, he determines——

* * *

By Mr. Mount:

Q. What did he have to do in connection with the grain fittings in the vessel?

* * *

The Witness: He had to prescribe what had to be done on the existing fittings to make them conform for the loading here.

By Mr. Mount:

Q. Did you get in touch with Captain Campbell about it?

A. Yes, we called Captain Campbell and asked him to meet [40] Haenn's man aboard when the ship docked.

Q. What agreement, if any, did you have about the performance of this work?

* * *

By Mr. Mount:

Q. What was your agreement?

A. The agreement with Haenn was that they were to provide labor and material to put the feeders in good shape.

Q. And when you say "in good shape" who was to determine what was good shape?

A. Captain Campbell of the New York Board of Underwriters.

Q. Do you know whether or not the Haenn Company performed work on the vessel?

A. They did.

Q. Did they submit a bill and receive payment?

A. They did.

Q. By the way, this contract you had, was it written or oral?

A. An oral contract.

[41] Q. Had you done business with the Haenn Company before?

A. Yes.

Q. Over how many years, approximately?

A. Oh, four or five years.

Q. Was this the usual way in which such matters were handled with them?

A. That is right, sir.

MR. MOUNT: Cross-examine.

CROSS-EXAMINATION.

By MR. BYRNE:

Q. Mr. DeWitt, did you ever have any arrangement about the basis of payment?

A. Well, we did.

Q. So that there was more to the contract than just to put the feeders in shape. What was the basis of payment?

A. The basis of payment was that we were to pay for cost of labor and material, and Haenn were to get a certain amount per man hour to pay for their overhead, and supervision, and profit.

Q. Was that a percentage, Mr. DeWitt?

A. No, sir, it was so much a man hour.

Q. Do you recall the exact words that you used in your conversation with the Haenn people?

A. The exact words that I used?

Q. Yes.

[42] A. No, I can only tell you generally.

Q. You used the words, to put in good shape. Did you use them during that conversation?

A. We spoke to the Haenn Company and told them that the ship was coming in, that there was certain work that had to be done, that we were not exactly certain as to the nature of it.

* * *

We told them that the ship was docking, that there was certain work to be done to put the ship in proper shape to load grain, and they would have to go down and perform the work, and get the information from the chief officer and Captain Campbell, and go ahead and do the work. That is it.

By Mr. Byrne:

Q. They were to do just that which Captain Campbell indicated was necessary to put the ship in condition to pass his requirements; isn't that so?

A. Yes.

Q. Nothing more, nothing less?

A. No, sir.

* * *

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[43] THEODORE KNOPF, having been duly sworn, was examined and testified as follows:

Direct Examination.

Mr. Mount: If the Court please, I call this witness as an officer of the third party defendant and as for cross-examination.

Mr. Byrne: I object to that, sir. He is not.

The Court: Sir?

Mr. Byrne: I object to that, sir. He is not.

Mr. Mount: He is not what?

Mr. Byrne: You are not entitled to call Mr. Knopf for cross-examination.

Mr. Mount: If he is not adverse I do not think anybody in the case is adverse. He is an officer.

The Court: Your contention is that this gentleman here is an——

Mr. Mount: Officer of a third party defendant.

The Court: Is an officer of a third party defendant.

MR. MOUNT: I call him as an interested party and as under cross-examination.

MR. BYRNE: Let us establish what he is first.

[44] THE COURT: That is right, if you do that, but you are calling him, and you say that your only purpose is to call him as though he were under cross-examination?

MR. MOUNT: That is right, sir.

THE COURT: All right, go ahead.

By MR. MOUNT:

Q. Mr. Knopf, are you connected with the Haenn Ship Ceiling and Refitting Corporation?

A. Yes, sir.

Q. Are you an officer of that corporation?

A. Yes, sir.

Q. What is your position?

A. General superintendent.

MR. BYRNE: If the Court please——

THE COURT: All right, go ahead.

By MR. MOUNT:

Q. As general superintendent——

THE COURT: Wait a minute. I think Mr. Byrne had something.

MR. BYRNE: I do not think that Mr. Mount started to cross-examine, sir.

Under the rule, sir, he may not cross-examine unless he proves more than this and I want to wait until he finishes.

[45] THE COURT: He has not proved anything yet, only the fact that he was general superintendent of this corporation.

* * *

By Mr. Mount:

Q. Do you have any other title?

A. No, sir.

Q. Do you understand what I mean, when I say: Are you an officer of the company?

A. No, I am no officer of the corporation.

Q. Who are the officers of the corporation?

A. Mr. Haenn, Mr. Wiedmann——

Q. Who else?

A. I think Mr. Mingey is, I am not sure. I do not know who the rest are.

Q. As general superintendent of the corporation what do you do?

A. Supervise all the work.

Q. All the work that it does?

A. That is right, general supervision.

Q. What business is the Haenn Ship Ceiling and Refitting Corporation engaged in?

[46] A. Shoring cargoes, fitting out grain ships. Shoring any kind of cargo on ships.

Q. You say "shoring"——

A. General cargo, machinery, parts, locomotives, anything.

Q. In other words, you do ship's——

A. Work.

Q. —work?

A. That is right.

Q. And that work is the securing of the cargo which is loaded in ships or to be loaded; is that right?

A. That is right.

* * *

Q. How long have you been a general superintendent of the Haenn Corporation?

A. Oh, I think about 10 or 12 years, something around there.

Q. Does that corporation specialize in this particular kind of work?

A. Yes.

Q. Now, were you on board the "Stad Vlaardingen" on the morning of November 25, 1946?

A. I was on there before the men went to work.

[47] Q. That was the same day she docked?

A. That is right.

Q. Did you meet Captain Campbell there?

A. I don't recall whether he was on there when I was there or not, but I did have orders from him. He may have been there, I am not sure.

Q. You say you had orders from him?

A. They came from either him or Lavino.

Q. What were your orders?

A. To recondition additional fittings and put two wing feeders in number two hatch in the 'tween decks.

Q. That meant that you had to repair all of the feeders which were damaged, didn't it?

MR. BYRNE: If the Court please, I object to the question.

THE COURT: He said: Recondition the additional fittings; what does that mean?

MR. BYRNE: Mr. Mount is leading the witness.

THE COURT: After the witness had said his job was to recondition the additional fittings——

MR. BYRNE: I do not wish to argue about it, if the Court please. I want to make my objection.

THE COURT: What is your objection?

MR. BYRNE: The question put by Mr. Mount is improper, sir. He is cross-examining the witness. He has [48] put a question to him as on cross-examination. He is saying: What you mean by your last answer is thus and so, and I say to the Court that that is improper.

By THE COURT:

Q. What do you mean by "recondition"?

A. Why, the original fittings were put in there to carry a load of grain previously, and if they needed anything to be done to them we would do it, so as to make it suitable for another cargo of grain.

Q. Put them back into shape?

A. Their original shape, yes.

By MR. MOUNT:

Q. In view of your experience you could tell what was required to be done, could you not?

A. That is right.

Q. The work which you had to do, who had charge of that for your company?

A. My brother.

Q. Did you advise him what had to be done?

A. I did.

Q. Who determined the manner in which the work was to be done?

A. The foreman on the job.

Q. Would that be your brother?

[49] A. My brother or the foreman, whoever would be in the hatch.

Q. In other words, your brother is a general foreman for over-all work, is that right?

A. That is right.

Q. And then you would have separate foremen for different men working on the same ship, is that right?

A. That is right.

Q. Under whose control was this work performed?

MR. BYRNE: I object to that, sir.

THE COURT: What do you mean: Under whose control? Do you mean who supervised the work?

MR. MOUNT: Yes, who supervised the work?

MR. BYRNE: This man was not there, if the Court please.

THE COURT: Does he know? He can say: I don't know the man who supervised the work.

MR. BYRNE: I am objecting to the question.

By THE COURT:

Q. Who was the general superintendent? Who supervised the work, Mr. Knopf?

A. I issued orders what to do to the ship and the foremen supervised the work when I left.

By MR. MOUNT:

Q. Did your company furnish all of the labor and material that was necessary in this case?

[50] A. Yes, sir.

Q. When you inspected this ship you could see that it had already previously had a cargo of grain in it, couldn't you?

A. That is right.

Q. And the damage to the fittings you also could see could you not?

A. That is right.

MR. BYRNE: If the Court please, you have not ruled on whether Mr. Mount may cross-examine this witness. Now, he has been doing it, and I object.

MR. MOUNT: Well, I think I have a right to cross-examine him as a general manager. He says he is the general superintendent of all the work that the company does.

MR. BYRNE: What is the law on it, Mr. Mount?

MR. MOUNT: I think the civil rules cover it, do they not?

THE COURT: What is the basis of the objection?

MR. BYRNE: Mr. Mount is cross-examining a witness whom he has called, sir. He may not do it, in my

judgment. He can ask the witness questions, but he is asking him questions as on cross-examination. I say that he has not established a basis for that type of examination, and I object to it.

THE COURT: If he has any right to call him [51] at all the right would be as under cross-examination.

MR. BYRNE: I think the man has said that he is not an officer and I think that is the only basis on which he could call him.

THE COURT: I will overrule your objection and grant you an exception.

MR. BYRNE: Your ruling then is that Mr. Mount may examine this witness as on cross-examination?

THE COURT: That is right.

MR. BYRNE: Thank you, sir.

MR. MOUNT: What was my last question?

* * *

By MR. MOUNT:

Q. In the performance of this work was any of the work done by any of the ship's officers or crew?

A. No, not as I know of, not a bit.

* * *

Q. Who determined the method which would be used by your [52] company in performing this work?

A. The foremen or the men themselves from long experience.

Q. They did not depend on advice from the officers of the crew?

A. They didn't give them any advice.

MR. BYRNE: I ask that that answer be stricken, sir. This man was not even there.

THE COURT: Strike it out.

* * *

By Mr. Mount:

Q. Was it part of your obligation to furnish all necessary tools and equipment in connection with the performance of this work?

Mr. Byrne: I object, sir. The contract will [53] speak for itself.

The Court: What is it? It is an oral contract, and Mr. DeWitt said that the contract or authorization which he gave to the Haenn Corporation was to go aboard the ship and to put it in good shape, the feeders. That meant to furnish all labor and materials, upon which the Haenn Corporation would be reimbursed for any expenditure for materials and labor, and a percentage per man per hour for the labor performed. That is as far as he went. The next step, this man is the general superintendent, what was the actual, practical effect of the statements made by Mr. DeWitt to whomever he sent down there? What did they do as a result of that?

This man here says they were to recondition the original fittings, and the foremen would determine how the work was to be done, the actual foremen on the job.

Mr. Byrne: I still object to Mr. Mount's question.

The Court: You say the contract will speak for itself. That is as much of the contract as the jury or I can get, other than might be elicited from those who knew something about it. That will be by word of mouth.

Mr. Byrne: If that is a part of the contract, yes, but that is not Mr. Mount's question.

[54] By The Court:

Q. Was it?

A. I heard Mr. Mount say tools. Men carry their own hatchets and saws, they are their own gear.

Q. Your own men carry them?

A. Yes, they carry them, the hatchet and saw, but anything else we supply, such as ladders, or chains for hoisting lumber or anything, that is our gear.

By Mr. Mount:

Q. In other words, you furnish all of the necessary gear, such as ropes?

A. Yes.

Q. (Continuing.) Ladders?

A. Ladders, chains for the hoisting of lumber aboard ship and putting on.

Q. When you went on board that vessel that morning did you look it all over to see what had to be done?

A. Pretty well all over.

Q. Do you remember looking in the number two hold?

A. Yes, in number two feeder.

Q. What work had to be done in the number two?

[55] A. Well, the burlap had to be tacked up where it was draped down and torn.

Q. Did you go down in the feeder?

A. No, I did not. I could see from the top looking down, from the top deck.

Q. Did the shores have to be put into the shifting boards?

A. I don't remember any shores to be put in, it was only the burlap, the burlap was in bad condition, I remember that.

* * *

[57] (The deposition of LAURENS WESTERHOFF was read as follows:

"Direct Examination.

Q. What is your full name?

A. Laurens Westerhoff.

Q. How old are you?

A. Thirty-two years old.

Q. How long have you been going to sea?

A. Fifteen years.

Q. What is your rating?

A. Boatswain.

Q. Were you employed on the steamship 'Stad Vlaardingen' in November of 1946?

A. Yes.

Q. In what capacity?

A. A. B. seaman.

Q. Do you remember an occasion in November of 1946 when a shore worker was injured?

A. Yes.

Q. Was the vessel in Philadelphia at that time?

A. Yes, sir.

Q. The vessel had come from where to Philadelphia?

A. It came from Rotterdam.

Q. Now, what was the first you knew of the injury to [58] this shore worker at Philadelphia?

A. The day it occurred.

Q. Where were you at the time?

A. In the messroom, having dinner.

Q. Did you see the injured man?

A. Yes.

Q. And when you saw him where was he?

A. Down below, in the hold.

Q. In what hold?

A. Hold number 3.

Q. In which side of the ship was he?

A. The port side.

Q. Was he near the side of the ship or near the center of the ship?

A. Almost in the center.

Q. After you saw the man in the hold did you go down into the hold yourself?

A. No.

* * *

Q. Was there a grain feeder in the hatch through which you saw the man?

A. Yes.

[59] Q. Had you seen the grain feeder before that time?

A. Yes.

Q. Had you been in the grain feeder?

A. At sea.

Q. How long before the date of this accident?

A. About four or five days before.

Q. And what was the reason for your being in the grain feeder?

A. He had to clean it out.

* * *

[60] Q. How did he get down into the grain feeder?

A. He opened first the hatch and then he lowered a rope ladder.

Q. After you got down into the hold what else was done in this connection, with this work?

A. I was only cleaning the feeder. I was not in the hold.

Q. When you went over side on the rope ladder into the feeder, what was in the feeder?

A. Only the two fore and afts.

Q. By the two fore and afts you mean what?

A. The two fore and aft beams.

Q. Was there anything else in the openings of the feeder besides the fore and aft beams?

A. No.

Q. While you were doing your work in the feeder what did you stand on?

A. On a hatch cover.

Q. Was the hatch cover in the feeder when you got in there, or was it put in afterwards?

A. It was put in afterwards.

[61] Q. How was that done?

A. I stepped on the rope ladder, and from the rope ladder to the fore and aft beam, and other seamen lowered the hatch cover and I laid it inside.

Q. What did the ends of the hatch cover rest upon?

A. One end rested on the middle beam and the other end was jammed against the other side of the grain feeder.

Q. Now, the end where the fore and aft beam was, was that at the location of the shifting boards?

A. On the fore and aft middle beam, but not on the other two fore and afts.

Q. Was there a shifting board at the place where the fore and aft beam was?

A. Yes, that was lying under.

* * *

Q. * * * When the hatch board was put in place as you have just described which way did it run, athwartship, or fore and aft?

A. Athwartships.

Q. Were there any braces or any timbers within the grain feeder?

A. None at all.

Q. When you got through working in there was the hatch [62] board removed?

A. When he went to work there, then I——

When I went to work there the hatch cover was not taken away. Otherwise I wouldn't have anything to stand on.

Q. Well, when you finished work was the hatch cover taken out?

A. Yes.

Q. After the time when you worked in this grain feeder, repairing it, or cleaning it, did you ever do any more work in that after—before you got to Philadelphia?

A. No, I didn't do any work there at all.

* * *

[63] Q. * * * Were any part of the athwartship beams within the opening of the feeder?

A. No.

Q. What was the condition of the burlap on the inside of this feeder?

A. To the best of my memory, it was torn.

* * *

[69] Q. And then what did you do after the hatch board was lowered down to you?

A. I laid it on the king beam.

Q. Which king beam?

A. The middle fore and aft.

Q. Where was that with respect to the shifting board?

A. The middle fore and aft, there stands on it a collar, and up on that is the center partition.

Q. Now, where did you put the hatch board with respect to that shifting board?

A. Against the collar of the center partition.

Q. Was it against the beam?

A. On the beam against the collar.

Q. In other words, it was resting right on the beam?

A. Yes.

Q. Where was the other end resting?

A. The other end was tight up against the feeder and couldn't go down.

Q. Was that also on the beam?

[70] A. No, it would not lie flat, because it was tight up against the side wall.

Q. And you kept it in that position until you completed your work, and then took it out?

A. When I was finished with my work I took it out.

Q. Did you keep it in that position until you were finished with your work?

A. Until I finished my work, yes, because it was a part of a hatch cover of the hatch above. It was a hatch cover of one of the other hatches, of the 'tween deck.

Q. Do you remember cleaning, all the other times or all the other occasions when you cleaned any other holds or feeders, since that time?

A. I hardly dare say. I do not know for certain.

Q. Well, have you done it many times?

A. Yes, quite often.

Q. And do you remember each occasion when you did it on the other ships or this ship since that time?

A. Only on the 'Vlaardingen'.

Q. What equipment did you use in cleaning out the feeder?

A. Only a broom.

Q. And what do you mean by cleaning out the feeder?

A. The grain that still sticks to the burlap, to sweep that down and off.

[71] Q. How long was that broom?

A. It was a broom with a long stem, about a meter and a half long.

Q. Do you mean that it would be about a meter and a half from the end of the broom to the end of the handle?

A. Yes, about a meter and a half.

Q. And how much would it be from the bottom of the stem to the bottom of the broom?

A. When I stood sweeping I could reach everything very well.

Q. You mean the broom was long enough so that you could reach all corners of the feeder with it?

A. Yes.

Q. Were you able to reach up to the top of the feeder from where you stood?

A. Yes.

Q. So that you cleaned the entire feeder, the walls, the top to bottom, with this broom while standing on the hatch board, is that right?

A. What I can remember, I could touch everything, even to the top.

Q. Did you have to stand on these fore and aft beams while the hatch board was being lowered to you from above?

A. Yes.

[72] Q. And did you then walk over to the middle of the hatch and place the hatch board, as you explained?

A. Yes.

Q. And during that trip it was forbidden to keep hatch boards in the feeder, was it not?

A. It was an order from the captain of the first officer, because it had to be used for loading.

Q. Do you remember whether the burlap was hanging down from the sides of the feeder?

A. It was torn here and there.")

* * *

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[75] JOHN M. CAMPBELL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. MOUNT:

Q. Captain Campbell, what is your occupation?

A. Chief surveyor for the Board of Underwriters of New York and Philadelphia.

Q. As such, what are your duties in connection with the loading and stowing of ships?

[76] A. I inspect the loading of cargoes, practically all cargoes that leave the Port of Philadelphia, with the exception of oil.

* * *

THE WITNESS: I inspect the loadings of all grain, and handle all general cargoes which are loaded in the Port of Philadelphia.

By MR. MOUNT:

Q. How long have you been engaged in that business?

A. Twenty-three years.

Q. Are you familiar with grain fittings and separations in vessels for carrying grain?

A. Yes.

Q. Did you examine the steamship "Stad Vlaardingen" when she was here in November, 1946?

A. I did.

Q. What did you find when you saw her in the Port of Philadelphia in respect to the grain fittings?

A. Well, the ship had been previously fitted for grain, and when she arrived at this port certain alterations and repairs had to be made on the fittings which were previously erected.

Q. What was the nature of those repairs and alterations?

A. Well, the feeders were damaged to some extent, the burlap inside of the feeders was torn, certain of the shores [77] or stiffeners were out of place, and then, as far as I can remember, there was a few planks, I mean here or there, that had to be repaired.

Q. Did you meet anybody on the boat in connection with these repairs?

A. Yes, I met the representative of George Haenn Ship Repair, Ship Fitters, and he went around with me and we discussed the nature of the repairs to be made.

Q. Did you advise him what you required?

A. I did.

Q. After the repairs were made did you inspect the vessel again?

A. I made another inspection of the vessel and certified her as in readiness to load a full cargo of grain.

Q. What is the purpose of grain feeders in these holds?

A. So that if the grain settles or moves in the holds these feeders will fill up the empty space and prevent the ship from taking a bad list.

Q. Will you come down where we have the model?

A. Yes.

Q. You are familiar with this setup of the grain fittings, are you not?

A. Yes.

Q. This type of fitting which was in the "Stad Vlaardingen", [78] this model represents the type of fitting, does it not?

A. Yes, it does represent the type of fitting.

Q. This fitting, can that be used for carrying any other type of cargo than grain?

A. No, it is used to carry grain.

Q. And if any other cargo is to be carried on the next voyage what happens?

A. The fittings are taken down. They are only in the way of the other cargo.

* * *

MR. BYRNE: Captain, I did not hear you.

* * *

By MR. MOUNT:

Q. These fittings, are they generally constructed of wood?

A. Yes.

Q. After they are taken out it leaves the structure of the vessel the same as it was before, is that correct?

A. Yes.

Q. And the structure of the vessel here, the permanent structure, is as indicated by the gray paint, is that right?

A. That is right.

* * *

[79] Q. I direct your attention here to these pieces of wood.

A. Yes.

Q. Running fore and aft, looking like two planks.

A. Yes.

Q. These two pieces of wood running fore and aft, which are indicated as being wooden planks.

A. That is right.

Q. One of which the ladder in the model is now resting on.

A. Yes.

Q. Do they serve any useful purpose in connection with the grain feeders?

A. Not so far as the grain feeders are concerned. They are only put there for the convenience of the grain fitter to erect the fittings.

[80] Q. Are they required by your regulations?

A. No.

Q. Do you recall whether they were in or out of this ship at this time?

A. I don't know.

MR. MOUNT: That is all.

CROSS-EXAMINATION.

By MR. BYRNE:

Q. Captain, did I understand you to say that those planks are put there for the convenience of the man who erects or has to fix the feeder in accordance with your specifications?

A. He may put them there sometimes, sometimes he puts planks there, sometimes he does the work by other means, but that plank has no relation at all as far as I am concerned with respect to the grain feeder.

Q. The only thing you ordered with respect to the grain feeder at number 2 was to tack up the burlap?

A. So far as I remember, yes.

* * *

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[81] FREDERICK ALBERT KNOPF, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. MOUNT:

Q. Mr. Knopf, how old are you?

A. Just fifty.

Q. What is your occupation?

A. Superintendent for George Haenn.

Q. What?

A. Outside superintendent for George J. Haenn.

* * *

Q. As outside superintendent what are your duties?

A. My duties are to hire men, send them to the different jobs, and go around and see if they are all done properly for Captain Campbell's survey.

Q. Are you informed before you go to a ship what Captain Campbell requires?

A. Yes, I am.

Q. How do you get that information?

[82] A. Through Mr. Knopf.

Q. That is your brother?

A. That is right.

Q. He was here yesterday.

A. That is right, Mr. Theodore Knopf.

Q. The question is, when do you first remember being on the steamship "Stad Vlaardingen"?

A. I remember being there in the afternoon, yes.

Q. What time did you come to work on the vessel?

A. One o'clock.

Q. Did you have work to do in more than one hold?

A. Yes.

Q. Do you recall how many holds you worked in, approximately?

A. I would generally go down them all, but we worked in approximately two holds.

Q. Which hold did you start working in?

A. 2 and 4. The first hatch after, we call it number 4—the bridge.

Q. That would be toward the after end of the ship?

A. Yes.

Q. And then after you worked in number 4 did you then proceed to number 2?

A. I proceeded to number 2. I worked number 2 lower hold, 'tween deck first—put some lumber in the top deck and then [83] proceeded to the lower hold.

Mr. Byrne: Not so fast.

The Witness: I put some lumber on the ship, then we proceeded in number 2 and number 4.

By Mr. Mount:

Q. Lower holds?

A. Lower holds and worked our way up.

Q. In other words, you had a gang working in number 4 and a gang working in number 2?

A. That is right.

Q. And you started about one o'clock?

A. That is right, sir.

Q. Before you started to do this work did you make any inspection of the condition of the holds?

A. No, sir, I did not.

Q. Did you inspect the fittings?

A. No, sir, I did not.

Q. Did you yourself immediately supervise the work which was being done?

A. I did, sir.

Q. Did you have any foremen there?

A. I had three or four foremen there, as I remember.

Q. Was Frank Rickert one of the foremen?

A. Yes.

[84] Q. What work was he supervising?

A. He was doing the feeder in number 4 at the time being, and I sent him to number 2 later on in the afternoon.

Q. About what time was that?

A. Well, I would say a little after four, approximately, I just know approximately ten after, fifteen after four.

Q. Well, the work of repairing which was done on this ship, was that all under your supervision?

A. Yes.

Q. Did any of the ship's officers have anything to do with it?

A. No, sir.

Q. Who decides what equipment you are going to use to perform this work?

A. Well, Mr. Knopf tells us what we need, and they take it and send it over to us, and we go ahead and do the work.

Q. In other words, when you go to a ship you get the equipment which you need to do the work with.

A. That is sent there ahead, before I get there.

Q. What does that consist of?

A. Well, ladders, chain, pennants to hoist the lumber up, blocks and hooks to pull the lumber up from the lower hold so we can repair it, and two-man saws.

Q. Did you make any inspection of the inside of number 2 [85] feeder before this work started?

A. I did not, no, sir. I did not make no inspection at all in number 2 feeder, because——

MR. BYRNE: Did you finish your answer with the word "because"?

By MR. MOUNT:

Q. Did you intend to say something further?

A. Because I didn't have time enough to get around to everything yet.

Q. Before you started to do this work did you have any conversation with the ship's officers about it?

A. No, only with Mr. Knopf.

Q. At the time Mr. Baccile was injured did you witness the accident?

A. No.

Q. Do you have any personal knowledge of how he met with his injury?

A. No, I do not know, because I was on the wharf.

* * *

[86] CROSS-EXAMINATION.

By MR. BYRNE:

Q. Did you look into the number 2 feeder, Mr. Knopf, at any time before this accident?

A. No, I did not.

Q. Had you gotten any instructions with respect to the number 2 feeder?

A. I did, from Mr. Knopf.

Q. What were those instructions?

A. The instructions was just to put the burlap back in place as it was before for surveyor Captain Campbell to pass for grain tightening.

Q. Did you order any of your men to work in the unmber 2 feeder before four o'clock?

A. There was nobody in the feeder before.

Q. None of your men were in the feeder——

A. Not inside——

Q. Let me finish my question. None of your men were in the feeder at number 2 at any time before Baccile and Rickert [87] went there?

A. Not inside the feeder.

* * *

FRANK RICKERT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. MOUNT:

Q. Mr. Rickert, how old are you?

A. Forty-four.

Q. What is your occupation?

A. Carpenter foreman.

Q. By whom are you employed?

A. Haenn Ship Ceiling and Refitting Corporation.

* * *

Q. Were you working for that company on November 25, 1946, when Mr. Salvadore Baccile was injured?

A. Yes, sir.

[88] Q. What time did you come on the vessel?

A. Approximately 1:15.

Q. When you first came on the vessel where did you first go to work?

A. At the after part of the ship. Number 4 hatch, I believe.

Q. How long did you work in that hatch?

A. Oh, I didn't work in the h[illegible]. I just started to work on the deck, taking hatch covers on.

Q. In other words, you took the top hatch covers off so that you could work in the hold, is that right?

A. That is right, sir.

Q. When you finished what work you were doing at number 4, did you then go to number 2 hatch?

A. No, sir, there was a little more to that, sir.

Q. Just tell us what happened in your own way.

A. We started to take them hatch covers off at number 4 hatch, and it wasn't merely about ten minutes until our lumber arrived, and I was sent ashore to bring this lumber to the ship.

Q. Then after you got the lumber on the ship what did you do?

A. Then we went aboard the vessel again and went aft in number 4 hatch.

Q. Did you finish the work in number 4 hatch which you were going to do?

[89] A. Yes.

Q. Then about what time was that?

A. Oh, that was around four o'clock, maybe a little later than four.

Q. Then where did you go from number 4 hatch?

A. Well, from number 4 hatch I was instructed to go to number 2 hatch.

Q. Who gave you the instructions?

A. Mr. Fred Knopf.

Q. When you went to number 2 hatch what did you do?

A. When I went to number 2 hatch, we went up there to tack up this burlap.

Q. At the time you went there were the hatch covers on or off?

A. They were off.

Q. That is, of the entire hatch or part of the hatch.

A. No, just partial, part of the hatch.

Q. Were there any hatch covers—you are referring now to the top deck, the main deck, is that right?

A. The top deck, that is right.

Q. Were the hatch covers on part of this hatch right immediately next to the feeder?

A. They are on partially off the opening of the feeder and partially over the feeder.

[90] Q. In other words, partially over the feeder they were off?

A. Yes.

Q. And at other places?

A. And at other places.

Q. Were there enough hatch covers in place there so that you could have a place to stand to do your work?

A. Yes.

Q. When you went to the number 2 hatch to do the work there, who was working with you?

A. Mr. Baccile and Mr. Patrick Moyles.

Q. Were you acting as foreman at that time?

A. Yes.

Q. Now go ahead and tell us what happened from the time you got to the number 2 hatch until Mr. Baccile was injured.

A. Well, we got to the number 2 hatch, we proceeded with our work, we lowered a ladder into the feeder.

Q. I wonder if you would mind coming down here where the model is and indicating to the jury so they can get an idea. Here is a ladder. There is the feeder. Perhaps you might arrange the deck boards here to show about where the hatch covers were, if you will. There are some hatch boards (indicating toward model).

* * *

[91] A. Well, that would be approximately the position of the hatch boards across the after end, the end partially over the feeder.

* * *

THE WITNESS: We proceeded from here, Mr. Mount, we come over here, the three of us, came over here, two of us lowered the ladder. Well, we lowered the ladder down there by the means of two men, one on each side of the ladder, and lowered it down onto that stage plank, that you [92] people can see, but I can not see where I am. It is resting on the stage planking.

Well, we went in there first, Mr. Mount, and we finished this corner.

We worked on this corner and we took that ladder out of there again.

We were on top here all the time, and we put the ladder down on this side of the stage planking, and we went down there to work.

MR. MOUNT: Yes.

THE WITNESS: Mr. Baccile went down, down in there to do the work. I stood on top to hold the ladder.

MR. MOUNT: Yes.

THE WITNESS: I stood up here in the position right behind the ladder with two hands upon it. That man went down on the ladder and got off the ladder, and came back into this corner.

This burlap was out of the corner, that is why the man had to go back into the corner, to see whether there was any lathing there which he had to remove or had to have new lath to replace in there.

By MR. MOUNT:

Q. How high did this ladder extend up above this deck planking there, approximately?

[93] A. Approximately 36 inches, 30 inches. Up to about this height on me (indicating).

Q. Were you bending over slightly?

A. Yes, sir.

Q. To be able to get hold of it?

A. That is right, sir.

Q. Before you put the ladder down did you make any inspection of this plank on which you rested it?

A. There was no inspection as far as I know. Just what I do personally, as far as inspection goes, I am only saying for my own good, I will tap that. That is just force of habit.

Q. How do you do the tapping that you speak of?

A. Well, this ladder, I can not do it myself, I must have the assistance of a man on the opposite side. We picked this ladder up maybe about two feet, eighteen inches.

Q. Yes.

A. At the angle we were standing at that time, we would be touching here, we would tap this in here (indicating). We would tap this on the plank.

Q. Where did you tap it first?

A. In the middle of it, that is the position the ladder went to first. I tapped this plank with the ladder.

Q. What did you find out when you tapped it?

[94] A. It felt quite solid, the reaction of the touch felt sound.

Q. Did you tap it any other place?

A. Well, from there on I proceeded to lower the ladder back on to the end of the feeder. That is, the ladder is touching there now. I did touch that a bit, too.

Q. Yes?

A. And it sounded very good. It sounded very sound to me.

Q. When you do that touching what do you expect to discover, a crack, or what?

A. Well, I do see cracks in them, but normally I will feel it here, if I get a dull sound that I know the plank is not sound.

Q. You know, of course, that this feeder had already been used once before?

A. Oh, yes.

Q. Now, can you see on this plank that is in here, you will notice that there is a cross piece of wood under it?

A. Yes.

Q. It has been referred to, I think, as a cleat.

A. As a cleat, yes.

* * *

[95] Q. When you stood up here on the top deck and looked down into the feeder could you see those cleats on the ends of this board?

A. No, sir.

Q. Why couldn't you see them?

A. This burlap had been loosened from previous hauling of grain, I believe, or otherwise, had been loosened otherwise, and so had draped down over the ends of this stage planking.

Q. For that reason you could not see what held the ends of the stage planking, is that right?

A. That is right.

Q. Well, now, when Mr. Baccile went down the ladder did he go down facing the ladder so that his feet and his back were towards the front end of the feeder?

A. Yes, that is how he proceeded down the ladder.

Q. When he got to the end of the ladder what was there for him to step on? Was the ladder sufficiently away from the end of that plank so that he would have a stepping place?

A. Yes, he had enough to put his foot on the bottom. I would say he had at least a foot of space to put his foot on.

Q. When he got to the bottom of the ladder he was then facing the ladder?

A. He was still facing the ladder.

Q. And he wanted to go on this plank from the front end of [96] the feeder towards the back, is that right?

A. Yes.

Q. And how did he get from the plank in front of the ladder on to the plank behind the ladder?

A. He had to step off the stage plank on to a fore and aft beam.

Q. Now, when you speak of the fore and aft beam, is that this beam here that you are referring to?

A. They are the fore and aft beams.

Q. And both of those fore and aft beams run through the bottom of the feeder; is that correct?

A. That is right, sir.

Q. So then he stepped on the fore and aft beam, you say, and from there back on to the plank?

A. That is right.

Q. Then what happened?

A. Well, Nick Baccile took approximately two steps aft on that stage plank; he looked into the corner of it—of that feeder, to see what was needed, or he did look to see whether there was anything to hinder him from replacing that—that was his job—and to tell me what was needed.

Q. And what he needed?

A. And what he needed.

Q. Yes?

A. Well, he told me what he needed in there, and he had stepped [97] back one step, then there was a friction on the stage plank, I believe it was just a slight friction, and I detected the friction, and I asked the man, did that stage plank move any. He said yes. And I immediately told him to get off that stage plank and come up.

Q. Well, he could have stepped off from the stage plank on to the steel beam, couldn't he?

A. No, sir.

Q. He had stepped from the beam to the stage planking once, hadn't he?

A. That is right, sir.

Q. How far was the beam away from the stage planking?

A. Oh, about eighteen to twenty inches, two foot.

Q. In other words, it was just a normal step?

A. A normal step.

Q. So that he could have stepped from the stage planking on to the beam the second time?

A. No, he couldn't very well do that, sir.

Q. Was there anything in the way that prevented him from doing that?

A. The only thing that was any hindrance was balance. The man wasn't facing the beam, the man was facing in that corner, on an angle. He had to stand slightly crossways on that plank, and that is the way the man stepped back, and when [98] the friction gave, when I told the man to get off, he was not near the after bulkhead, he was at least four feet away from that bulkhead.

Q. What bulkhead are you talking about now?

A. This plexiglass that the jury can see.

Q. Yes.

A. In order to step off there a distance of four feet he had no choice of putting his hand anywhere, he had no choice of balance, to balance himself to step on to this narrow beam. That would be this beam right under that (indicating).

Q. Was the ladder secured in any way?

A. Only by me, sir, I was holding it on top.

Q. There was no rope or anything?

A. No rope, sir.

Q. So that the only thing that was holding up the ladder was this planking on which it was resting?

A. That is right, sir.

MR. MOUNT: Suppose you resume the stand.

JUROR No. 7: Your Honor, does the jury have a right to ask questions?

THE COURT: You remember what I said yesterday. Have you used it?

JUROR No. 7: Yes, sir.

THE COURT: All right. What is the question?

[99] JUROR No. 7: Was the practice used in number 2 exactly the same as was used in number 4? In other words, was this plank in number 4 there and used safely?

MR. MOUNT: I do not think we have any testimony of that. I have no reason not to let the jury know what the fact is, if it is important.

I do not think it is important so far as number 4 is concerned, but we can interrogate the witness as to what was done in number 4, if you wish.

THE COURT: You can do that, but I think you will have to bear in mind the testimony of Captain Campbell, that this stage planking is no part of the equipment necessary to the feeder, and it is only used, to follow his words, for the convenience of the men working in the feeder.

MR. BYRNE: May I have an exception?

THE COURT: Yes.

By MR. MOUNT:

Q. Now, Mr. Rickert, when you were working at number 4 you say you were only there for a few minutes, and then you went ashore to get lumber; is that right?

A. That is right.

Q. What work did you do in number 4?

A. I am afraid you have me confused now.

THE COURT: Do not get confused.

[100] MR. MOUNT: Do not do that. If you do not understand what I am asking you just be sure and say so.

THE WITNESS: May I ask a question? Do you refer to when we first went aboard the ship or when I went aboard this vessel the second time?

MR. MOUNT: The second time.

THE WITNESS: When I went aboard the ship the second time it was approximately around three o'clock,

or maybe a little before three. I proceeded to the number 4 hatch to work there. That was my instructions, to go to number 4 hatch and work in that feeder

By Mr. Mount:

Q. And what did you do in there?

A. Well, I went there, that feeder was already in progress, there were already men working there, and the two men that—well, I went there, they were all working. I am all confused. I went there, there were two men working in the feeder, and then the rest of the men came to the feeder, and we proceeded with the job normally. Now, the job there was to replace some planks that had been missing in the feeder bulkhead.

Q. In other words, you were doing a different job of work in number 4 from what you were doing in number 2?

A. That is right, sir.

Q. Did you have anything to do with how the men got down [101] into the feeder in number 4, or did they do it themselves?

A. They were already in that feeder when I got there.

Q. Who was the foremen on that feeder?

A. Well, offhand I really couldn't say.

Q. You were not the foreman supervising the work in that feeder, were you?

A. No, not definitely, not directly.

Q. Yes. Do you or do you not know what platforms or what staging was built in number 4 for the men that were doing the work down there?

A. When I originally went there, when we started that thing and opened it up I did see what was in there.

Q. Yes?

A. Which is normally my position, to look around, I am a foreman, to see what was needed. I didn't know at that time whether I was going to be working in the feeder, or whether I was going to be working on the wharf. Automatically I was sent on the wharf, but if I hadn't been

sent on the wharf I would have automatically known what I was going to do when I looked down here.

Q. Unless you were going to work in there you would not pay much attention to what was in number 4?

A. No, sir, I did see what was in number 4 before I went on to the wharf.

Q. Did you make any inspection to see what was in there?

[102] A. No, there was no inspection, it was just a visual look from the top at the time.

MR. MOUNT: Cross-examine.

CROSS-EXAMINATION.

By MR. BYRNE:

Q. Mr. Rickert, at the number 4 hatch, did Mr. Baccile work there, or the number 4 feeder?

A. Yes, Mr. Baccile worked at number 4 feeder.

Q. Did you see men working inside the number 4 feeder?

A. Yes, sir.

Q. Were there any stage plankings in the number 4 feeder when you first saw it?

A. There were.

Q. Did you at any time see men working upon those stage plankings in the number 4 feeder?

A. Did I ever see men working in there?

Q. Yes, using those stage plankings in the number 4 to stand on to perform their work?

A. Yes, there were two men in there standing on this stage planking.

Q. Do you know who they were?

A. No, I don't offhand.

Q. Would Baccile have been one of them, if you remember?

A. Not at the time. He was outside of the feeder at the time [103] I looked in the feeder. There were two other men.

Q. Had your men put those plankings in number 4, or were they there when you came to the feeder?

A. No, sir, they were in there.

Q. And the stage plankings in the number 2 feeder, were they put in by your men, or were they there when you came to work there?

A. No, they were in there when we came there.

MR. BYRNE: Will you come down a minute, please? I want to use the model.

By MR. BYRNE:

Q. Now, if I understand your testimony, and you correct me if I am wrong, this accident happened on the stage planking which is nearest the middle upright here, or shifting board.

A. That is where the accident happened.

Q. If I understood your testimony a few minutes ago, when Mr. Mount was asking you questions, did I understand you to say that you used the ladder on the other stage planking in this same feeder first?

A. That is right, I used it on that other stage planking first.

Q. Who went down on that stage planking?

A. Nick Baccile.

Q. That is the same man who was injured a little later?

[104] A. That is right.

Q. Did he have any accident or any trouble on that stage planking, the one that is on the outer side?

A. No, sir.

Q. He finished his job?

A. He finished that job.

Q. Was that the same job, to tack up burlap?

A. That is right, sir.

MR. BYRNE: Go ahead and take the stand.

By MR. BYRNE:

Q. You testified that when you were working at the unmber 4 you had to replace some planks. Did you also have to do anything to the burlap in number 4?

A. The burlap had to be replaced, yes, sir, after the planks were installed.

Q. And is that when the men used the stage planking in the number 4 here, when they put that burlap on?

A. They had been using the stage plank previous to that.

Q. Did they use it to put the burlap on too?

A. They used it to put the burlap on also.

Q. Are you familiar, Mr. Rickert, with the practice and custom, and the method of work, of companies in and around Philadelphia, who do this type of work on grain fittings on oceangoing vessels?

[105] A. I only have the experience with this one company I am working for at the present time.

Q. Did you ever use a Jacob's ladder to go down into one of those?

A. Not to repair one.

Q. The method that you used to test this plank, in other words, the sounding of it, is that, as far as you know in your experience, the usual and customary method of testing planking such as this?

MR. MOUNT: I object to that.

Do not answer the question.

THE COURT: Is that the usual and customary method, did you say?

MR. BYRNE: Yes, sir.

THE COURT: That he uses himself?

MR. BYRNE: Yes, sir.

You have worked for how long, Mr. Rickert?

THE COURT: Ten years.

THE WITNESS: Ten years.

MR. MOUNT: For only one company.

THE COURT: Yes.

MR. BYRNE: I will prove it later on, Judge McGranery.

MR. MOUNT: I object to it being proved by this [106] witness on cross-examination.

THE COURT: Well, he did testify, Mr. Mount, that that was the method he did use.

MR. MOUNT: That is as far as he could go.

THE COURT: That is right.

MR. MOUNT: Whether it is the usual and customary or safe method, that is the question in the case for the jury to say.

THE COURT: That is as far as the probative value of the cross-examination could go, I think. It is limited to that.

MR. BYRNE: Oh, yes.

THE COURT: It is limited strictly to himself.

MR. MOUNT: If you ask him if that is the only kind of examination that he ever made, of course, I have no objection, but as to what is customary in the port, I do object to that.

THE COURT: That is right, and that would be objectionable, what is customary in the port.

MR. BYRNE: The only point I would like to establish is whether or not——

THE COURT: I think it is pretty clear.

MR. BYRNE: May I frame another question?

THE COURT: Yes.

[107] By MR. BYRNE:

Q. Mr. Rickert, did you test on this occasion in any different way than you ordinarily test when you are working on this kind of a job, or did you make the same test?

A. You are asking me things that don't make sense to me.

MR. BYRNE: I am sorry.

THE COURT: He has already testified, Mr. Byrne, that he and another man who helped him lifted the ladder and first tapped it in the center, he said that he could tell if it gave a solid sound; then he moved it a little farther on and tapped it again. That was the only inspection that he made. He could not see the cleats on which the stage planking was resting for the reason that they were covered by the burlap.

Is that what you testified?

MR. BYRNE: I do not dispute that.

I really want to establish whether he ever does it differently than that. May I so frame a question?

THE COURT: Yes, but he said so before.

MR. BYRNE: He has not answered that question, sir.

THE COURT: He said that is the only way he does it.

By MR. BYRNE:

[108] Q. Did you testify that is the way you do it, not only on this ship, but on other ships?

A. I testified that it is not a test, it is merely a habit.

THE COURT: That is right, that is what he said.

By MR. BYRNE:

Q. Then, can you tell from your experience, by listening to the sound of a piece of wood which you knock or bump, whether or not it is cracked?

A. Yes, I can tell.

MR. BYRNE: I have no other questions.

RE-DIRECT EXAMINATION.

By MR. MOUNT:

Q. Mr. Rickert, the plank did not break in half, did it?

A. No, sir.

Q. Do you know which end came loose?

A. The after end.

Q. And that is the end farthest away from the bottom part of the ladder, is that right?

A. Yes, sir, that is right.

Q. In other words, this end toward the back end of the feeder?

A. That is the end that came loose.

Q. And that is not the end that you tapped, is it?

A. No, sir.

* * *

[109] RE-CROSS-EXAMINATION.

By MR. BYRNE:

Q. Mr. Rickert, was that a new plank or an old plank?

A. That was an old plank.

* * *

(The survey report of Edward F. Carter was marked Third-party Plaintiffs' Exhibit 1.)

* * *

[110] (A photograph was marked Third-party Plaintiffs' Exhibit 2.)

* * *

(A photograph was marked Third-party Plaintiffs' Exhibit 3.)

* * *

(A photograph was marked Third-party Plaintiffs' Exhibit 4.)

* * *

(A photograph was marked Third-party Plaintiffs' Exhibit 5.)

* * *

(The deposition of PIETER REEDEKER was read as follows:

[111] DIRECT EXAMINATION.

Q. Mr. Reedeker, how old are you?

A. Forty-four.

* * *

Q. What licenses do you have?

A. Chief officer.

* * * *

Q. Were you the chief officer on the "Stad Vlaardingen" in November, 1946, when she was in Philadelphia?

A. Yes.

Q. How long had you been chief officer before that, one or two trips?

A. No, since 1939—'40.

[112] Q. Since 1940?

A. Yes.

Q. Now, were you on the vessel when she was in Montreal in October, 1946?

A. Yes.

Q. And it was there that the grain feeders were put in the vessel?

A. Yes, sir.

Q. And after the grain feeders were put in in Montreal where did the vessel go to?

A. To Rotterdam.

Q. To Rotterdam. And what grain was carried in the ship at that time?

A. Oats, I think it was. Oats, yes.

Q. And the vessel left Rotterdam, and did she come directly to Philadelphia?

A. Yes.

Q. Did the grain feeders remain in the vessel?

A. Yes, sir.

Q. Now, when the vessel arrived in Philadelphia—before the vessel arrived in Philadelphia was there any work done on these grain feeders, while the vessel was at sea?

A. Yes.

[113] Q. What was it?

A. Cleaning up the feeders and oats.

Q. What cleaning up was to be done in the feeders?

A. Well, brushing burlap, so the remaining oats fell down, and dust, and sweeping the holds, because of the next grain load, could be another kind of grain.

Q. Did you see any of that work done on the vessel?

A. Oh, yes.

Q. Were you familiar with the condition of these feeders on the vessel?

A. Yes, fairly.

Q. When the vessel arrived in Philadelphia in November of 1946 did you make any inspection of the holds and the grain feeders?

A. Yes, sir.

Q. Tell us who was with you and when the inspection was made.

A. Sometime during the day on arrival the inspection was made, and I went around with Captain Campbell, the surveyor.

Q. Who was Captain Campbell?

A. He was surveyor of underwriters, I think.

Q. And that was the same day that this accident happened, wasn't it?

[114] A. That is right.

Q. Well, now, you went with Captain Campbell. Did you look in all of the holds?

A. We went through the 'tween decks.

Q. Yes.

A. Had a look at the 'tween decks and had a look from the main deck down in the holds and—well, that is about all.

Q. Well, now, when you inspected these grain feeders what was in the feeder? What was—what was in the feeder?

A. Nothing was in the feeder.

Q. Well, were there any wood, pieces of wood——

A. No.

Q. —or wood structure of any kind?

A. No.

• • •

[116] Q. Now, had you ordered any repairs, before you arrived into Philadelphia had you ordered any repairs or any structural work done in this feeder in number 3 hatch?

A. I hadn't ordered anything. The captain has only the authority to order.

Q. Well, had the captain ordered any?

A. Well, I couldn't tell you.

Q. Well, I mean, you as chief officer were in charge [117] of the work on the ship?

A. Yes, but here you are asking before we came in port.

Q. Yes.

A. And I don't know about that. When we were in port I knew that there were orders to shore, the captain told me, to have shifting boards fixed again.

Q. Yes, but I am speaking of while you were at sea. Did you order any of your crew to do any work——

A. Oh.

Q. —in this feeder?

A. Oh, before it. Yes, I did.

Q. Well, what work was ordered, did you order to be done in this feeder in number 3?

A. Well, as I told you, cleaning——

Q. Well, did you——

A. —brushing down all the loose grain and dust.

Q. Aside from cleaning the feeder was any other work done in that feeder?

A. No.

Q. Well, now, in regard to the work which was to be done after the vessel got in port, there was work ordered done, is that right?

A. Yes.

[118] Q. And what did that work consist of?

A. Well, a broken shoring in the lower hold had to be repaired again.

Q. That is, the shoring for what?

A. Shoring for the shifting boards.

Q. Yes.

A. And the shifting boards themselves had to be repaired, had boards to be replaced and new boards put in.

Q. Well, did you know that that work was ordered to be done?

A. Which work do you mean?

Q. The work in Philadelphia, repairing the shifting boards?

A. Yes.

Q. Was that part of the work that was to be done as a result of Captain Campbell's inspection when you were with him?

A. That is right.

Q. Who did the work of repairing—was there actually any work of repairing the shifting boards done in number 2 hold after the vessel got to Philadelphia?

A. Any repairing being done in number 2 hold?

Q. Was any done?

A. Yes.

[119] Q. And who did that work?

A. Well, the contractor. I don't know——

Q. Did you see the work being performed?

A. I beg your pardon?

Q. Did you see the work being done?

A. Yes, I have seen it done. I have been inspecting it after it had been finished.

Q. What is that?

A. I have been inspecting it after it had been finished, if it had been done as Captain Campbell had told me.

Q. And the work was finished before the vessel took grain, is that right?

A. That is right.

Q. And did you inspect the work after it was done?

A. Yes.

Q. Well, did you give any orders to the foreman?

A. Well, in so far, the foreman went around with Captain Campbell just as well, and when I told them after

while—when I was with Captain Campbell, I was at first with Captain Campbell, and seemingly Captain Campbell went around with the foreman afterwards, and I don't know about that, but I told the foreman what Captain Campbell told me to be done.

[120] He said, 'Well, I know all about it, don't worry, I will fix it.'

Q. Well, so far——

A. Because I knew it was Captain Campbell who informed it, because new feeders had to be built, and I didn't give him the orders, but Captain Campbell did.

* * *

Q. Well, the work that was actually done, did you superintend the work while it was being done?

A. Well, I had to look now and again, here and there.

* * *

[121] Cross-Examination.

Q. When you were on the 'tween deck of the ship——

A. Yes.

Q. —you couldn't see what was inside the feeders, could you?

A. Not from the 'tween deck, no."

* * *

[124] (The deposition of PIETER PRONKER was read as follows:

Direct Examination.

"Q. Mr. Pronker, how old are you?

A. Thirty-nine.

* * *

[125] Q. Now, do you recall an injury to a shore worker by the name of Baccile, who was employed by the grain fitting people, when she was here in November of 1946?

A. Yes, sir, there was an accident.

Q. Now, did you see this man injured?

A. Yes, sir.

Q. Where were you at the time?

[126] A. Passing the hold.

Q. On which side of the ship?

A. Port side.

Q. And which direction were you going, forward or aft?

A. Aft.

Q. Where had you been immediately before that?

A. I had been to the firemen to pay them the money—to one of the firemen.

Q. And he was located where, forward?

A. Forward, yes.

Q. Now, just go ahead and tell us what you saw as you came to number 3 hatch.

A. I see that—I saw that''——)

MR. BYRNE: Excuse me just a moment. There is a matter I think we ought to discuss with Your Honor at side bar with respect to this deposition. May we see you, sir?

THE COURT: All right.

(The following transpired at side bar:

MR. BYRNE: If the Court please, you will remember Judge Kirkpatrick's order in this case. Now, is it still applicable or not?

THE COURT: No, the penalty is against the original defendants, in favor of, and on the petition of, and at the request of the plaintiff.

[127] MR. BYRNE: I have an exception to Your Honor's ruling?

THE COURT: Yes.

MR. MOUNT: As a matter of fact, sir, I do not believe that this testimony comes within the order anyway, because this man does not testify to anything that he saw about a plank, he does not mention it.

THE COURT: The only question in the penalty was that the original defendants would not be permitted, at the request and on the petition of the plaintiff, to show that there was no plank there. That is the extent of the order.

MR. BYRNE: But that order grew out of those depositions, as I understand it.

MR. MOUNT: No, it did not.

MR. BYRNE: It followed them.

THE COURT: If this deposition does not have any reference to the plank the order would have no effect on it at all.

MR. BYRNE: I wanted to get Your Honor's ruling on that point, and Your Honor has granted me an exception upon it.

THE COURT: Yes.)

• • •

[128] "Q. Now, did you see this man injured?

A. Yes, sir.

Q. Where were you at the time?

A. Passing the hold.

Q. On which side of the ship?

A. Port side.

Q. And which direction were you going, forward or aft?

A. Aft.

• • •

Q. Now, just go ahead and tell us what you saw as you came by number 2 hatch.

A. I see that—I saw that the man went over a little bit to forward.

Q. Now, went over a little bit to forward?

A. Yes.

Q. Yes, and then what?

A. And immediately after——

[129] And after that I saw that he fell down in the hold."

* * *

[139] (The deposition of ARIE VAN DER LEE was read as follows:

DIRECT EXAMINATION.

"Q. Mr. Van der Lee, how old are you?

A. Fifty-two, sir.

* * *

Q. What is your rating?

A. Boatswain.

Q. Were you boatswain on the 'Stad Vlaardingen' in November of 1946?

A. Yes, sir.

* * *

Q. Did you witness the accident in which Mr. Baccile, a shore worker, was injured, when the vessel was in Philadelphia in 1946?

A. No.

Q. Did you see the accident?

[140] A. I not seen it, but——

Q. Where were you at the time it happened?

A. The time it happened, just, I come from aft, to, went to the mess room, to get my meal.

Q. And when you heard about it what did you do?

A. When I heard about the accident I went right away downstairs, in the hold.

Q. And when you got down in the hold what did you see?

A. I see lying down near the shifting boards that man.

Q. On which side of the ship was it?

A. On the port side.

* * *

[141] Q. Now, after the vessel left Rotterdam for Philadelphia was any work done in these grain fittings?

A. Oh, yes; cleaning.

Q. Who had charge of that work?

A. I am in charge of that work.

Q. Now, do you know how these grain feeders were built?

A. Beg pardon, sir?

Q. Do you know how the grain feeders were constructed, how they were put in the ship?

A. Well, yes, a bit. Of course, I am not a carpenter.

Q. Well, did you look in these grain feeders?

A. Yes, you look in the grain feeders.

Q. Well, did you inspect them at any time?

A. Yes, always.

Q. Well, do you recall whether or not there was a grain feeder in number 2 hatch?

A. Number 2 hatch.

[142] Q. Now, on the voyage from Rotterdam to Philadelphia did you say these feeders were cleaned out?

A. Cleaned out, yes, sir.

Q. Did you see that work done?

A. Yes, sir.

Q. And what did that work consist of?

A. Consist of?

Q. What did it amount to? What was done?

A. Well, sweeping the dust.

Q. Did you see the men doing that work——

A. Yes, sir.

Q. —yourself? How did they get down into the grain feeder?

A. Well, you take the hatches off, of course, the hatch covers was what we needed, and then we hung then a rope ladder and went down in the feeder.

Q. When they got down in the feeder what was there to stand on?

A. Well, in the half part, of course, we got two forward and afts.

Q. Fore and aft?

A. Fore and aft.

Q. You mean fore and aft, what?

A. Beams, iron beams.

[143] Q. Yes.

A. That is where they stand.

Q. Did you see anything else to stand on in there?

A. Nothing.

Q. When you inspected these feeders were there any other structures in the feeder?

A. Nothing at all.

Q. Well, now, when you went down in the lower hold and found this injured man down there you say you saw a ladder. Was there any other equipment down there besides a ladder?

A. Yes, there was a piece of wood there.

Q. What kind of wood was it?

A. Just ordinary wood.

Q. Well, about how wide was it?

A. About—about, a plank from about ten inches wide and three inches thick, about.

Q. And how long was it?

A. How long? Well, how long—I can't say exactly how long—about nine feet, or something."

* * *

[144] Mr. Mount: If the Court please, that is the Third-party plaintiffs' case. I rest.

Mr. Byrne: If the Court please, I would like to make a motion. Do you want to hear us on it?

* * *

[146] Mr. Byrne: If the Court please, the third-party defendant, the Haenn Ship Ceiling and Refitting Corporation moves that the Court dismiss this case as a matter of law for two reasons; first, that the Longshoremen's and Harbor Workers' Compensation Act covers the conclusive liability of the Haenn Company here, and, secondly, that the evidence introduced in this case leaves no question of fact for determination

by this jury as to negligence on the part of the Haenn Company. There just is no conflicting evidence of fact nor any inference from which this jury could find negligence on the part of the Haenn Company.

They are the two grounds, and from here on it is argument.

(Argument off the record.)

THE COURT: I will reserve decision now on both grounds and direct that it go to the jury.

I am going to submit it to the jury on interrogatories that I am going to prepare, and we will reserve decision until after everyone has had an opportunity to argue it fully.

[147] THIRD-PARTY DEFENDANT'S EVIDENCE.

* * *

(The deposition of ALFRED MILLARD was read as follows:

DIRECT EXAMINATION.

"Q. Mr. Millard, are you presently employed by the Wolfe Stevedore Limited, Montreal?

A. I am.

Q. Are you employed as boss carpenter?

[148] A. I am.

Q. Were you the boss carpenter for the Wolfe Stevedore Limited, in October, 1946?

A. I was.

Q. In October, 1946, were you in charge of the construction of a grain feeder on the 'Stad Vlaardingen', at Montreal?

A. I was.

Q. Was this grain feeder on the 'Stad Vlaardingen' constructed by the Wolfe Stevedore Limited?

A. Yes.

Q. And this grain feeder lead into the number 2 hold of the 'Stad Vlaardingen'?

A. Right.

Q. Can you tell us what kind of wood was used in constructing the ends and sides of the grain feeder?

A. The ends and the sides?

Q. Yes.

A. Three-inch lumber; twelve feet for the ends and ten feet for the sides.

Q. When you speak of 'three-inch lumber', were they planks or boards?

A. They averaged 3 x 9, 3 x 8, and 3 x 10. It all depends on what we get from the lumber yard people.

[149] Q. In other words, it is plank three inches thick, and the widths may vary from nine to ten inches?

A. Yes. And they go to twelve feet, sometimes.

Q. Now, were these planks, which you have described, and which formed the ends and the sides of the grain feeder, placed vertically or horizontally?

A. To my memory, they were placed up and down—vertically. I am getting all mixed up. I have to watch this. It is up and down.

Q. Up and down?

A. Yes, right down the feeder.

Q. That is vertically?

A. Yes, vertically.

Q. And in width, did the feeder extend from one side of the hatch to the other side of the hatch?

A. By the plan, it gives us twenty-eight feet wide. The ends are twenty-eight feet wide, and the sides were eight feet, ten inches wide. I would like to look at this to make sure, because I do not want to make any mistake. Ten feet high, and the length of the feeder was eight feet—the length of the sides, you see?")

MR. BYRNE: Ladies and gentlemen, the witness referred to a document at that time.

(The reading of the deposition continued as follows:

[150] "Q. Yes.

A. It was 8 x 28. That is the size of the feeder.

Q. And the twenty-eight feet would run athwartship?

A. Yes.

Q. And the eight feet would run fore and aft?

A. Yes.

Q. What was the depth of the feeder? How far below the main deck did it extend?

A. On account of the beam being lower, it would extend about, I would say, about eighteen inches.

Q. I am talking about the distance below the main deck. From the main deck, how far down did the feeder go?

A. The sides would go in line with the hatch, and it would catch the top hatch. That would give you ten feet, all told.

Q. Would that be approximately the distance between the main deck, and the 'tween deck?

A. Right. That is the side. It is ten feet high there.

Q. Ten feet?

A. Yes. The distance would be about nine feet between the two decks, so we have to put a ten-foot deal to have the deal catch on the top deck and the lower deck.

Q. When you speak of 'deal,' you mean these three-inch planks?

[151] A. Yes. We will call them 'planks'. The sides would be approximately nine feet from deck to deck. Then, by putting a ten-foot plank there, it would be resting six inches on top and six inches down below.

Q. Now, how were the sides and the ends of the feeder held in place?

A. By a strap two inche by six inches, right around the feeder.

Q. Would that be on the outside of the feeder, Mr. Millard?

A. On the outside of the feeder. The side would be resting on the combing, and the end would be resting on the fore and aft beams.

You have five beams in that ship, and we have to put the straps onto those five beams across, to hold the weight of the feeder, so the feeder would not fall into the hold.

Q. These straps on the outside; are they sometimes referred to as 'scarping'?

A. No. Nobody walks on that. It is only to secure the feeder. It is only purposely to build the feeder.

Q. No, I am speaking of the deals—these straps: are they in a horizontal position outside the planks which forms the ends and sides?

A. Right.

[152] Q. And are these horizontal pieces of wood sometimes referred to as 'scarping'?

A. You would have to give me an idea of what you mean by 'scarping'.

Q. You call them 'straps'?

A. 'Straps', yes.

Q. And when they are nailing these straps to the three-inch planking, at the ends and the sides, do the men work outside the feeder?

A. There is a scaffold outside and a scaffold inside.

Q. When the ends and the sides of the feeder are completed, do you line the feeder?

A. We burlap it.

Q. Did you line the feeder with burlap on the 'Stad Vlaardingen'?

A. We have to do that; otherwise the grain would go through the joists of the deals.

Q. In lining the inside of the feeder, did the men work on the inside of the feeder?

A. They have to be on the inside of the feeder to put the burlap in.

Q. Was any staging erected inside the feeder, for the men to stand on while they were lining the inside of the feeder with burlap?

A. Yes, there was.

[153] Q. Of what did that staging consist?

A. Each end of the feeder, which goes across the hatch athwartship there—about six or seven inches; sometimes eight inches; it varies; it all depends—we put a strip of 2 x 6 eighteen inches—sometime it comas fifteen inches, but it does not matter much—and that is nailed to the three-inch plank that is up and down there, onto both sides, and then we go ahead and put a three-inch plank there and jam it in there, and that rests on that. We call it a 'cleat'—that 2 x 6, we will say 2 x 6, eighteen inches. That supports the plank.

Then we put nails in the end of that plank, through the cleat there and a little strap there. It is a kind of a strap. That means that the 2 x 6 is nailed with at least three

or four nails in it, and there is a nail in the plank which has been jammed in between the two ends, which makes it very solid.

Q. To make it a little more clear: there is a piece of wood, which you call a 'cleat', which is, roughly, eighteen inches, by two inches by six inches?

A. Right.

Q. And you said these cleats are nailed to the end of the feeder—the forward-end and the after-end?

[154] A. Right.

Q. Are they nailed in a horizontal position?

A. Generally they are nailed on about ten degrees, to make it so that the pressure of the man who is standing on that board—so that the nails will not bend.

Q. You mean they are tilted upward at an angle of ten degrees?

A. Yes.

Q. And this cleat you speak of——

A. It is flat on the up-and-down plank.

Q. Would these cleats be parallel to the deck?

A. Generally they are, yes.

Q. And you say those are nailed to the ends of the feeder?

A. Right.

Q. It is a two-inch piece of wood?

A. A two-inch piece of wood, yes.

Q. What length of nails do you use to attach them?

A. Four-inch nails; always four-inch nails.

We have three sizes of nails; we have four-inch nails; we have four-inch nails for two-inch lumber, and we have three-inch nails for one-inch lumber, and we have inch-and-one-half nails for what we call 'battens'; they like a lath. That is what is generally used.

[155] On that ship there were no three-inch nails used; only four-inch and inch-and-one-half nails were used.

Q. Only what type of nails were used?

A. Four-inch and one-and-one-half inch. The one-and-one-half inch nails were used for the burlap.

Q. After you fastened the cleats at the forward-end and after-end of the feeder, you laid a three-inch plank along from one cleat forward, to the other cleat, aft?

A. Yes.

Q. Have you any idea of the approximate width of that plank?

A. It would be nine inches at least, because we never put anything less than nine inches, because it would be too narrow, and would not have the strength there.

Q. And what type of nails do you use to attach the plank to the cleats?

A. Four-inch.

Q. And were the men who attached those cleats to the plank, on top of it, inside the feeder?

A. The men who attached those cleats, are the men who are going to go on that piece of work. They are going to work on it.

Q. They would be the men who stand on it, to line the inside with burlap?

[156] A. Absolutely; because any scaffolding which is made, as far as I am concerned, must be done by the men who have to use it.

Q. What is the purpose of doing that?

A. For instance, if I make a scaffold, and you go on that scaffold, you are nervous, but if you make it yourself, you know it is well made, or you would not go on there.

Q. In ensures stability of the staging—that is, the solidity of the staging?

A. Yes; it is for their own security.

Q. Before and after 1946, have Wolfe Stevedore Limited constructed many grain feeders in vessels in Montreal?

A. We have an average of about one hundred a year—one hundred a season—at least.

Q. And is it your general practice to construct a staging such as you have described, inside the feeder for the men to stand on when lining the inside of the feeder?

A. Yes, we generally do that. There are different types of ships. Sometimes, you have to make different arrangements, you see.

But this type of ship generally comes with standard sides, because it has athwartship beams.

[157] Q. And are there some cases where this staging or planks have been left in place, after the grain feeder is completed, and the vessel leaves?

A. Yes; there are cases where this old wood is aboard ship. If it is old wood that is being used on part of this feeder—if we take old pieces of wood which belonged to the ship—which is just as good as new ones—we leave it in place, because sometimes a ship comes back, and we have to do the repairs, and we have something to stand on there.

But if it is our own lumber which we buy and pay for ourselves, we take it out. There are times when we are not in too much of a hurry to take them out, and we leave them there.")

MR. BYRNE: That is all.

* * *

[158] CROSS-EXAMINATION.

* * *

[162] "Q. In other words, those straps you speak of, form really what is like the four corner posts of a box?

A. Absolutely.

Q. After you get this feeder built, of course, the bottom of it is open?

A. Yes.

* * *

[167] Q. It is customary to use used lumber?

A. Oh, yes. We are obliged to use it.

It must be good lumber. We do not put in anything that is not good, because we have to work on that lumber. It has to be good lumber. But it can be broken up and scrapped, too. We scrap that. We do not care about it, if it is not good.

Q. Now, when this vessel came here, did she have any shifting boards or any feeder built in her?

A. Not to my knowledge.

Q. So that all the structure of the grain feeder and the shifting board was built here?

A. Yes.

[168] Q. Did you have any new lumber which you used in erecting the feeder?

A. It was practically all new on the feeder, except the shifting board.

Q. In other words, the feeder part was new lumber?

A. Yes.

Q. And the shifting board part was used lumber? Is that correct?

A. Yes.

Q. Now, after you got the ends and sides of the feeder built, you built the shifting board from the 'tween deck up to the top deck? Is that right?

A. Yes, sir.

Q. Now, when you put this burlap on the inside of the feeder; what is the purpose of that?

A. To keep the grain from running through the joists of the planking.

Q. Do you put the planks tight?

A. Yes. But sometimes a plank is wet, or it may be dry, and it may become twisted, and you have to have burlap. Unless it is tongued and grooved. With tongue-and-groove lumber, we do not put burlap.

Q. Were you using tongued-and-grooved lumber this time?

A. No.

Q. How much space do you have between the planks in [169] the feeder?

A. Well, I will tell you. It varies. Sometimes, you have a very little space. On the one hand, you might have five or six planks which are not well together, like. Maybe the wood has been cut with a fault in it, and there would be

spaces there where the grain could come through. This was a new feeder. The planks would be all twisted, you see, and that is where we really have to use burlap.

This burlap is made on purpose, so the grain will not leak out of the feeder, in case they have grain in the 'tween deck, and it is not the same type of grain.

The regulation is you must have burlap, leak or no leak—so it will not leak. It is a regulation of the Port of Montreal, or, I guess, any place at all. It is sensible, because when the ship is rolling, these planks may open a little, and the grain would all leak out.

Q. Whether you build the feeder with new lumber, or not, there are still spaces?

A. Absolutely. I defy anybody not to see any spaces there. It does not take a big space for a grain of wheat to go through.

• • •

[170] Q. Are there any fittings on the beams, or at the sides of the hatch, which are there for the purpose of assisting you to build the feeder?

A. Yes——

[171] Q. Do you ever put any ship's parts or fittings into the building of the feeder?

A. Oh, yes. Take the beam itself; that is part of the ship, which helps to build the feeder.

Otherwise, if you had no athwart-ship beams there you would have to make wooden beams across there.

Q. What I am getting at is this: are there any special fittings around the hatch to facilitate the building of the feeder?

A. The combing is one part.

Q. The combing is the normal part of the ship, is it not?

A. Yes. There are some ships which have permanent fittings for feeders.

Q. Did this ship have them?

A. No.

Q. In other words, this ship had only the usual beams and hatch-combing, you would find in ordinary ships?

A. I would not say 'ordinary ships', because this ship is not of the ordinary type.

Q. What I am getting at is this: in addition to the beams and the hatch-combing which this ship had, were there any additional fittings or equipment for the erection of a grain feeder?

A. No.

* * *

[172] Q. Now, when you put the burlap inside, how do you fasten the burlap? With tacks, or do you put a lath on it to hold it, or what?

A. We start by spreading the burlap from the shifting board, to the ends and the sides.

[173] Q. In other words, the shifting board is in the center of the ship?

A. Yes. We start to make an over-lap of this shifting board, so the grain will not go through the joints, and we carry it right to the side of the ship. Then we just put a temporary nail in it.

When we have the burlap hanging down there, we use what we call 'battens'—one-half inch by three inches—and we carry the burlap around the top of the feeder.

Q. To the top of the feeder?

A. Right. And in the corners we put two battens, one on each side, one on the shifting board and one on the end.

Q. They go up and down?

A. Yes, and at the sides and ends, at the same time, to where there is a lap in the burlap, and we put them up and down there, too.

Q. So you have a course which runs Horizontally?

A. Right around.

* * *

[174] Q. You said that after you got the feeder built, you put the cleat on the forward end or on the after-end, and put the planks in?

A. Right.

Q. Whereabouts is the plank located? Is it near the side of the feeder, or nearer the shifting board? Which is it?

A. No. It is right near the side. It would be about eight or nine inches.

Q. And do you have a man standing on it, in order to put the battens on?

A. Yes.

Q. To hold the burlap in place?

A. Yes.

Q. Well, did they have one or two such planks? Can you say?

A. It varies. Sometimes you can put two. It all depends on which gang it is. Some gangs are very [175] particular about the Provincial rules, you know.

Sometimes they put two, and sometimes they put a piece of lumber that catches on the little beam, underneath the fore and aft beams.

In this case they have five beams. Sometimes they put a little piece of wood there to catch the first beam, and they have to put a nail right through that piece of wood to stop it from coming out, and that generally is taken out when we are finished.

Q. Then, in other words, when you build the shifting board on top of the fore and aft center beam, the shifting board is set on top of that flange?

A. We call it a 'lip'. The shifting board is part of the outer lip, sometimes a little to one side. But it must be on the lip.

Q. They run it toward the side?

A. Right.

Q. And it rests on these two fore and aft beams, which go through this hatch? Is that right?

A. Yes.

Q. Well, in this particular case, in this particular ship, at this particular time, do you have any definite recollection of what boards were put in there—if any?

A. Well, I will tell you. As far as I can remember, it [176] would be at least one anyway, on each side—where the sides of the feeder are. I cannot say—because the center beam, with their fore and aft beams, would not be so far off, that they would have to put another plank there.

Q. You do not know whether there was one or two boards put in this feeder, on this occasion?

A. No. I would not go so far as to say that I do know. But it is possible, they could have been there.")

* * *

SALVADORE BACCILE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

* * *

[177] By MR. BYRNE:

Q. Mr. Baccile, where do you live?

A. 2830 No. Orkney Street.

Q. In Philadelphia?

A. Yes.

Q. Mr. Baccile, you were originally the plaintiff, or the man who started the suit against Halcyon Lines in this case?

A. Yes.

Q. And you were the man who was working for the Haenn Company on the 25th of November in 1946, when you were hurt on board the SS. "Stad Vlaardingen"?

A. Yes.

Q. Mr. Baccile, how long had you worked for the Haenn Company?

A. Oh, I would say about three years.

Q. Mr. Baccile, had you worked for other companies doing similar work in Philadelphia either before that time or since you first started to work for Haenn?

A. Yes.

Q. What companies?

A. Philadelphia Ship Supply and Lumber Company, Dugan and McNamara and Independent Pier.

* * *

[178] Q. Do all of those companies that you have mentioned build and refit grain fittings and grain feeders on ships?

A. Yes, sir.

Q. Was that the work that you did for those other companies as well as for Haenn?

A. Yes.

Q. How long had you been doing that type of work here in Philadelphia all told?

A. Oh, about four years, sir.

Q. And that is carpentry work, Mr. Baccile?

A. Yes, sir.

Q. Mr. Baccile, the day that you met with this accident do you remember about what time you got to the ship?

A. What time I got to the ship?

Q. Yes.

A. About 1:15, sir. One, one-fifteen.

Q. Will you go ahead, without my interrupting you, and just tell the Court and the jury what happened? Tell it the time as it happened that afternoon, from the time you first got to the ship up until the time that you were hurt.

A. We were hired for the one o'clock start, that is, one o'clock in the afternoon, to go to Girard Point.

We got to Girard Point and we went up on the ship, up the gangway, up on to the ship, and we went to number [179] 4 hatch, which was closest to the gangway.

We had to move some hatch covers at number 4, and to see what was in the ship, whether it was empty or not, and then we got orders to go down on the dock and bring lumber up from the foot of the pier to the ship, and I was driving the little gas jitney pulling these little trucks with lumber up to the ship, and the lumber was hauled on board.

We got on board about 3:15 to 3:30, and then I was sent to number 4 hatch to work. I helped replace some of the planks in the feeder bulkhead of the feeder in number 4 hatch.

After the planks were replaced, I stood on the stage planking in number 4 hatch and finished burlaping number 4 hatch—number 4 feeder, rather.

I went down into the lower hold of number 4. I was there about two or three minutes. Then I was called up to go up to number 2 hatch.

When I got up to number 2 hatch there was a ladder on the stage planking on the left side.

Q. Mr. Baccile, I do not like to ask you, but can you come down here and show this jury what this is?

A. I will try, sir.

Q. It has been testified that this is a model of the number 4 feeder. And you, I think, saw it in Mr. Freedman's office.

[180] A. Number 2 feeder.

Q. Number 2 feeder?

A. Yes, sir.

Q. Can you tell the members of this jury and Judge McGranery just what you did at the number 2 feeder on board that ship?

A. Yes.

I came down this ladder here. It was on this stage planking, which is the left side. I came down the stage planking here and came underneath, and our work was back here (indicating), to tighten up the burlap and tighten the corners in each corner of the feeder.

Then after I had tightened up this corner (indicating) I took the ladder out, and then took it over and put it on this stage planking here.

Can you see that stage planking there (indicating)?

Then I went——

Q. Can I interrupt you a moment?

A. Yes.

Q. Were there any hatch boards at the after section of the hatch between the coaming and the first beam?

A. Oh, yes, this here (indicating) was to my recollection, this here was covered here.

After I got down onto the stage planking I [181] came back to the after end of the stage planking and I had to tighten up the burlap in this corner here (indicating), back here.

After I got back there I see what was to be done, rather, what I needed, and then I called up to Mr. Rickert, who was the foreman at the time, and he was up above, and I called to him and told him what I needed, and I had took one step back to call up to Mr. Rickert, and suddenly the plank gave on this after end, and so I told Frank, and he said to me: get off and get up.

So I turned around towards the ladder, and I took one or two steps towards the ladder, when the stage planking gave, and I fell to the bottom of the hold.

Q. Nick, when you came back to this feeder, before you ever went into it the first time——

A. Yes, sir.

Q. It is correct you were down in it twice?

A. Yes.

Q. Before you went down the first time had you put the ladder down, or was the ladder already down there when you got there?

A. The ladder was there when I got there.

Q. Who went to that feeder with you?

A. Mr. Rickert and another workman.

Q. Do you remember his name?

A. Pat Moyles.

[182] Q. What was his job?

A. He was to stand on deck and give me whatever I called up for.

Q. How did he do that? Did he hand it to you, or did he give it to you on a rope, or what?

A. No, he was to hand it to me.

Q. You helped Mr. Rickert take the ladder off the first stage planking?

A. Yes, sir.

Q. On what is called the outboard, or certainly the side nearest the inshore edge of the ship?

A. Yes, sir.

Q. You helped Mr. Rickert take the ladder up?

A. Yes, sir.

Q. Did you help him put it down here on the second stage planking?

A. Yes, sir.

Q. What if anything did you do with that ladder with respect to that stage planking before you got on the ladder?

A. Well, I helped Frank Rickert sound it for cracked boards, and we tapped the plank in the center with the ladder. Mr. Rickert was holding one end and I was holding the other. I was helping him sound it. And then we hit it—we tapped the stage planking with the bottom rung of the ladder forward, and then [183] we had placed the ladder on the stage planking.

Q. Now, did you listen to that board when it was sounded with the ladder?

A. Yes, sir, it sounded solid to me, sir.

Q. You have worked for other companies around the port of Philadelphia, according to your testimony, doing this same type of work?

A. Yes, sir.

Q. Are you able to teli the Court and the jury whether that is the customary and usual way of sounding a stage planking before it is used?

A. Yes, sir.

Q. For other companies as well as Haenn?

A. Yes, sir.

Q. When you went down there what was the condition of the burlap?

A. The burlap was hanging.

Q. How long would you assume that it was from the first time that you put your weight on the ladder to climb down and the time that the board actually gave way and you fell?

A. I would say a few minutes. The time it took me to get from the top of the ladder down on to the stage planking and walk to the after end, and I was on there for about two minutes before the stage planking gave.

Q. Now, when you went on this stage planking on the other side [184] of this same feeder——

A. Yes.

Q. —did you notice any give or anything wrong with that plank?

A. No, sir.

Q. You worked there and did your job?

A. Yes, sir.

Q. Do you know where Moyles was when this happened?

A. Do you mean when the stage planking gave?

Q. Yes.

A. No.

Q. Had you called up to Moyles before the accident actually happened?

A. I called up to Mr. Rickert.

Q. What was Moyles' job?

A. He was on deck to hand me whatever I needed.

Q. And when you called to Mr. Rickert did you ask for something?

A. Yes, sir, I think it was lath, that is, this stripping about an inch or two wide and about, I would say, a quarter inch thick, which was to tighten the burlap up with.

Q. When you first came down this ladder, Nick, do you remember how you got around the ladder so that you were back on what we will call the after end of that stage planking?

A. Yes; if I stand in front of it, I can visualize it more. [185] Now, as I came down the ladder I came face down towards the ladder, with my front part of my body to the inner part of the ladder, walking down backwards.

Now, as I got to the bottom of the ladder I stepped on the stage planking, and with my left hand, to step on to the—holding the ladder with my left hand I put my right foot down on to the beam, and then put the other foot down on to the beam, and then put my two feet up on the stage planking, which puts me underneath the ladder, between the ladder and the after bulkhead of the feeder.

Q. What did you do with your hands?

A. Oh, I used the shifting boards for support.

Q. When you got back in that back end to look what you had to do, Nick, which way did you face, do you know?

A. I was facing towards the corner. The plank was about ten inches wide. Let me see. The plank was about ten inches wide, and we had to keep our feet sideways, this way (indicating), and I needed both sides for support.

Q. You mean the shifting board with one hand and the after side of the feeder with one hand?

A. That is right.

Q. You sort of kept your balance that way?

A. Yes, sir.

Q. Have you ever worked in a feeder to repair it from a rope ladder or Jacob's ladder?

[186] A. No, sir.

Q. First of all, was this stage planking above, or below, or at the same level as the steel beams that were in there?

A. Oh, the stage planking was above.

Q. About how far?

A. Oh, I would say about ten or twelve inches.

Q. Could you have stepped from the stage planking to one of those beams when you felt this board give?

A. No. When that board first gave I was scared, and I was—I was using the bulkhead, rather the shifting bulkhead, for support, so the beam to me looked about six inches wide, and I was faced toward the bulkhead, the shifting—when I say "bulkhead" I mean the shifting bulkhead—with the left side of my body partially towards the ladder, but when the stage planking gave I was so scared, and the only thing I had for support was the shifting bulkhead.

Q. When you were standing in that position where was the nearest steel beam?

A. Oh, that was to the right of me.

Q. Front or back, or directly to your right?

A. No, that was back of me, to the right.

Q. Now, could you have stood on that steel beam in this particular feeder and done the work that you had to do?

A. In that corner?

Q. Yes.

[187] A. No, sir.

Q. Why?

A. The steel beam was about four feet away from the shifting bulkhead.

* * *

CROSS-EXAMINATION.

* * *

By MR. MOUNT:

Q. When you went down into the feeder could you see the ends of that planking?

A. When I first went down into the feeder?

Q. No, before you went down, when you and Rickert were putting the ladder in and sounding this board, could you see the ends of that plank?

[188] A. Oh, there was burlap draped over the planks.

Q. And you could not tell whether it was fastened to anything or not by looking at it?

A. Why, in number 4 hatch, sir, the cleat, the stage planking was on cleats.

Q. But I mean in this hatch, you could not tell whether the cleat was there or not because of the fact that the burlap covered the ends of the plank?

A. I didn't see the cleat here, sir.

Q. And the reason you could not see it was because it was covered with burlap?

A. With burlap, yes, sir.

Q. Have you ever done any work on a ship that did not have any stage planking in it at all?

A. No, sir. Every ship that I ever worked on always had stage planking.

Q. Well, sometimes you put them in yourselves, don't you?

A. We put stage planking in, sir—stage planking in when we construct ourselves.

Q. And if there had been no stage planking in this feeder you would have had to put one in?

A. I never was in any without them.

Q. You say that back in number 4 one of the side planks, some of the side planks were missing?

A. The after bulkhead.

[189] Q. The after bulkhead planks were missing?

A. Yes, sir.

Q. And the only thing that held those planks on was just the nails, is that right?

A. Which planks, sir, the planks of the bulkhead?

Q. Yes.

A. They were nailed, sir.

Q. When you were on the outside of the feeder you could take a hammer and just knock them off without much trouble, couldn't you?

A. The planks, I imagine so, yes.

Q. Was the ladder secured by anything?

A. Yes, sir, Mr. Rickert held it on top, sir.

Q. Was it secured by a rope or any other equipment or device?

A. No. I don't know whether it was secured by a rope or not, but Mr. Rickert was up there holding the ladder, sir.

Q. There was no rope attached to the bottom end of it, was there, the bottom end of the ladder?

A. No, the end of the ladder, the bottom end was—the bottom rung was resting on the stage planking.

Q. In other words, the rung was resting on the stage planking?

A. On the stage planking, and the two bottom ends of the ladder were up against the forward bulkhead of the feeder.

Q. Yes.

[190] A. The forward wall.

Q. Well, you say the kind of inspection you made is the only one you know about?

A. Yes, sir.

Q. So that at the time you went on to the planking there was nothing to hold the ladder up but the plank, is that right?

A. That is right, sir.

Q. Couldn't you have put some hatch covers down on these two fore and aft beams down at the bottom of the feeder?

MR. BYRNE: Don't answer that, Nick. I object to that. That is argumentative.

THE COURT: What is argumentative, whether he could do it or not?

MR. BYRNE: Yes, sir. He could have stayed home in bed, sir. That would have been an argumentative question, too.

THE COURT: Of course, he would not be here in that case.

MR. BYRNE: That is right.

THE COURT: Now that he is here we have to weigh the other problem.

I will overrule the objection and grant you an exception.

By MR. MOUNT:

Q. My question was, couldn't you have taken one of these [191] shorter—one of these sections of hatch boards and laid it on these two fore and aft beams down at the bottom of the feeder? That could have been done, couldn't it?

A. You could have put the hatch covers on the beams, but you couldn't work from them.

Q. Well, it would make a solid platform and it would be safe, would it not?

A. It would not, no, sir. No, sir.

Q. Do you mean to say that if you built a platform on these two iron beams down in the bottom of the hold that wouldn't be safe?

A. No, sir, not for the work I had to do on the corner, sir.

Q. But after you got the hatch covers down there, and laid them across the beams, you could have lashed the hatch covers around the beams so that they would not give way, couldn't you?

A. No, sir, if you are standing on one end, that end is going to tipple, that is going to give, sir.

Q. But if you lashed the other end around the beam that would prevent them from bending, wouldn't it?

A. But you still couldn't do the work. You have to work in the corner.

Q. If you took a hatch cover and put it far enough out—those hatch covers are nine feet, aren't they?

A. I don't know the measurements, sir.

[192] Q. If you had a board, whether it is a hatch cover or whether it is a board, but if you had a hatch board that was long enough to lay across these two beams, assuming

that they were down in the bottom; if it was long enough to do that, you could then have lashed it around both of these beams, and it would have been a safe support, wouldn't it?

A. I wouldn't work on anything like that, sir.

Q. It wouldn't fall down?

A. I don't know if it would fall down or not, sir.

Q. If you lashed it tight enough and securely enough, the plank, around both of those beams, it would be secure, would it not?

A. Maybe.

Q. Well, if it was lashed with a rope sufficiently tight around each of the beams then there would not be any reason why it would not stay there, would there?

A. No; that is true, sir.

Q. Did your company have any rope ladders?

A. Rope ladders?

Q. Yes.

A. No, sir.

Q. So that with the equipment which was furnished you you had no way of going down in the hold on a safe ladder in order to find out——

MR. BYRNE: I am objecting to the question, sir.

• • •

[193] MR. MOUNT: Well, I will withdraw the question and rephrase it.

By MR. MOUNT:

Q. You know what a rope ladder is, don't you?

A. I have seen them, sir.

Q. And it could be secured at the top of the deck, could it not?

A. I don't know, sir. There are all different types of rope [194] ladders, sir.

Q. Is there any reason why a rope ladder could not be secured at the deck?

A. I only work with the equipment that we have, sir, that is furnished, sir.

Q. I see, and you were not furnished a rope ladder?

A. We were not furnished a rope ladder for that, sir.

Q. If you had a rope ladder and it was fastened up here (indicating), you could have gone down on the rope ladder and have seen whether or not there was a cleat under the plank, could you not?

MR. BYRNE: Do not answer that.

I object to that, sir.

THE COURT: I will overrule it.

MR. BYRNE: Sir, I submit that——

THE COURT: And grant you an exception.

MR. MOUNT: Read my question, please.

(The last question was repeated by the reporter.)

THE WITNESS: If I had a rope ladder, sure.

MR. MOUNT: That is all.

RE-DIRECT EXAMINATION.

By MR. BYRNE:

Q. Mr. Baccile, did the other companies for whom you have worked have rope ladders or furnish rope ladders for this kind of work?

A. No.

[195] Q. I wanted to ask you this, and I do not think you will have to get up; you will remember you were talking about the stage planking which was on the outboard side of the feeder in number 2, the one that you worked on first in number 2. As you looked at it did that seem to be the same as the other one which was near the shifting bulkhead and which later gave way when your accident happened?

A. Yes, they both seemed the same, sir.

Q. Were they new lumber or old lumber?

A. No, it was old lumber. It was covered with grain and dirt—grain dust and dirt.

Q. Did the Haenn Company take any old lumber on board?

A. No, sir, they took new lumber on board.

Q. The staging in number 4, Mr. Baccile, did it seem to you to be the same as the staging in number 2?

A. Yes, sir, that was used lumber, too, sir.

Q. Mr. Baccile, do you know where the hatch covers for the 'tween deck of that ship were? Did you see any of them?

A. No, sir.

MR. BYRNE: No further questions.

RE-CROSS-EXAMINATION.

By MR. MOUNT:

Q. Well, you did not look for any, did you?

A. I didn't see any, sir.

Q. Did you make an effort to find any?

[196] A. My work was inside the feeder, sir.

Q. Did you make an effort to find them? Did you look for them?

A. No, sir, I was told to go inside the feeder and tighten up burlap.

Q. And your foreman was the man who told you to do that?

A. Yes, sir.

Q. You were just following the orders of your foreman?

A. Yes, sir, that is true.

Q. And the only inspection that he made is what you have said, is that right?

MR. BYRNE: I object to that, sir.

THE COURT: Why?

MR. BYRNE: If the Court please, the foreman has testified himself, and Mr. Mount, unless he states what the foreman's testimony is, as to the inspection, may not cross-examine this witness with that type of a question, sir. He has tried to put words in the witness' mouth, which obviously the witness can not answer. He was not in Court this morning when he testified.

I have no objection to any fair question he wants to ask. I just say that that was not a fair question.

By Mr. Mount:

Q. Were you and Mr. Rickert together all the time you were doing this work?

[197] A. In number 2 hatch?

Q. Yes.

A. Mr. Rickert was on the main deck.

Q. Yes?

A. And I was down below.

Q. You were in his sight all the time, weren't you?

A. Yes.

Q. You put the ladder down on one side?

A. The ladder was on one side.

Q. And you and he put it down there?

A. On the one where the accident occurred, sir.

Q. You were with him at that time, were you not?

A. Yes, sir.

Q. You were never out of sight of each other, a few feet away, were n't you?

A. That is right, sir.

Q. You saw what he was doing?

A. I saw what he was doing.

Q. As a matter of fact, during the time you were going down the ladder, you were facing, and he was at the top of the ladder?

A. He was at the top of the ladder.

Q. Was he there all the time while you were going down the ladder?

A. Yes, sir.

[198] Q. So that from the time the ladder came from the one side, was put down to the position near the center of the ship, you saw everything he did, didn't you?

A. Yes.

Q. And the only test—the only inspection he made then is what you have just before said, isn't it?

A. I don't know what inspections he made, but while I was with him that was the only test I have made myself with him.

Q. Did you see him do anything else while you were there with him?

A. No, sir.

MR. MOUNT: That is all.

MR. BYRNE: Thank you very much, sir.

MR. BYRNE: That is the defendant's case, sir.

THE COURT: Very well.

MR. BYRNE: I renew the motion of this morning for the record. You remember you asked me——

THE COURT: For you to renew the motion.

MR. BYRNE: For me to renew the motion.

THE COURT: I thought you might do that with the regular formal written points.

MR. BYRNE: Yes, sir, I will do that.

THE COURT: Then that will take care of it.

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[202] MR. BYRNE: I will be brief, Judge McGranery.

I move for binding instructions in this case, for two reasons; first of all, the argument that the Workmen's Compensation Act is the exclusive remedy as against the employer Haenn, and, secondly, because in my judgment the evidence which is in the record in this case does not contain any evidence of conflict for this jury to decide.

The only evidence is that the method used here was the usual and customary one in the Port of Philadelphia. Mr. Mount has had his captain testify that the work could have been done in other ways, but I submit that that is not a sufficient showing to make a conflict for decision by this jury.

THE COURT: So that it might be clear in your mind, Mr. Byrne, about what the view of the Court is with respect to that, I think it is quite clear——

MR. BYRNE: I think so.

THE COURT: I have always been of the opinion that under the law there could be a concurrent liability here as between you two parties.

MR. BYRNE: Oh, I understand that, Judge McGranery.

THE COURT: And it is under that theory that I am going to submit it to the jury, and we will at least keep [203] that part clear.

I am in thorough accord with you that on the question of liability directly to Baccile, he would be restricted to the compensation act, but if there is in whole or in part any liability to the ship owner as the result of either your sole negligence or your concurring breach of duty I think that part is for the jury.

MR. BYRNE: I understand, but my point is, Judge McGranery, that I see no conflict in the evidence to be resolved by this Court. In other words, "could have been" is not enough to carry a case to the jury.

THE COURT: I think that is right.

MR. BYRNE: That is all that is here, except my affirmative proof.

THE COURT: There is affirmatively in here, in my opinion, sufficient for the jury to justify their finding. Let me put it that way.

MR. BYRNE: All right. I merely make my motion.

THE COURT: Now, Mr. Mount, do you have anything to say about that?

MR. MOUNT: Well, no, sir.

THE COURT: If you have not, then we will take up the points for charge, and take them up in the order of third party plaintiffs' requests for charge first.

[204] "1. There was a duty on the part of Haenn Ship Ceiling and Refitting Corporation, the employer of plaintiff Salvadore Baccile, to make an inspection and examination of the parts of the grain fittings which it had undertaken to repair, to furnish competent foremen and other persons to supervise the work, and to perform the work of repairing the grain fittings in the vessel in a careful and proper manner in order to prevent injury to the plaintiff."

That I will affirm, and in affirming that for the third party plaintiffs I will grant an exception to the third party defendant.

"2. The Haenn Ship Ceiling and Refitting Corporation was under a duty to the vessel owners to perform the work of repairing grain fittings in the vessel in a careful and proper manner."

Affirmed.

"3. The duty which the vessel owner owed to Salvadore Baccile, as a business guest was to furnish him a reasonably safe place in which to work, and to make inspections and examinations to ascertain the condition of the parts of the ship which he and his employer were engaged in repairing."

That I will affirm.

[205] "4. Where the vessel owner has given control of a part of the vessel to an independent contractor engaged to perform work in that part of the vessel, the vessel owner has no duty to supervise or control the manner in which the independent contractor and his employees perform the work."

That I will deny as drawn, and you may have an exception to that, Mr. Mount.

MR. MOUNT: Yes, sir.

THE COURT: "5. If you find that the ship owner and the Haenn Ship Ceiling and Refitting Corporation both failed

to make proper inspections to determine whether the grain feeder in which the plaintiff was to perform his work was safe they were negligent, and you will determine the extent or percentage that the negligence of each contributed to the accident."

That I will affirm.

Now, taking Mr. Byrne's points:

"1. Under all of the evidence your verdict must be for the Third Party Defendant, Haenn Ship Ceiling and Refitting Corporation."

That is denied.

"2. The Original Defendant, Halcyon Lines, has settled the claim of Baccile against it by agreeing to the [206] entry of a judgment in favor of Baccile and against Halcyon in the sum of Sixty Five Thousand Dollars ($65,000.00).

Halcyon, having settled with Baccile, is here suing Baccile's employer, Haenn, in order to recover a portion of the payment it has made to Baccile. Halcyon can recover in this suit only if you find as a fact that Haenn was careless or negligent in some way which either caused or substantially contributed to Baccile's accident."

That will be denied as drawn and an exception noted.

"3. Halcyon would be liable to Baccile only if it had been itself at fault and you are entitled to consider that fact in determining whether there was any negligence on the part of Haenn separate and distinct from the negligence of Halcyon and if you further find that the negligence of Haenn was a substantial factor in contributing to Baccile's accident."

I could affirm the last part of it, but the first part of it, I think, Mr. Byrne——

Mr. Mount: If the Court please, I object to that, it seems to me very confusing the way it is drawn.

THE COURT: The first part?

MR. MOUNT: Well, the fact that Halcyon would be liable to Baccile, that fact has nothing to do with it. It [207] doesn't follow——

THE COURT: We said that to the jury, but we said it in a way a little different from the way it is drawn by Mr. Byrne.

I will deny that as drawn.

I will grant you an exception, Mr. Byrne.

"4. The shipowner, Halcyon, owed to Haenn and to all of Haenn's employees a non-delegable duty to furnish them with a reasonably safe place in which to perform their work."

Under the cases as I see them I am led to the belief pretty certainly that there can be a concurring liability and it is delegable. Otherwise I do not think you would be here.

MR. BYRNE: Then if Your Honor is denying that point as drawn would you affirm it with the word "non-delegable" stricken out?

MR. MOUNT: I would have no objection to it.

THE COURT: "The shipowner, Halcyon, owed to Haenn and to all of Haenn's employees a non-delegable duty to furnish them with a reasonably safe place in which to perform their work."

MR. MOUNT: I would have no objection to that if the word "non-delegable" is withdrawn.

[208] MR. BYRNE: I do not withdraw it, sir. I make as a separate request, if you are denying that as drawn, that you affirm a point with the words "non-delegable" out.

THE COURT: Yes. I will affirm it, amending it, however, so as to strike the words "non-delegable" or "not delegable".

"5. If you find that the stage planking in the No. 2 feeder was placed there with the intention that men

should work upon it and you further find that Haenn relied upon that fact, then your verdict must be in favor of Haenn."

There you have the other job of inspection, and that was one of the vital things; from the very beginning we talked about it, that they could not be seen—the cleats, they called them, on the edges, that were covered with the burlap, and nobody ever looked to see what those planks were resting upon, if upon anything. So I will deny that as drawn, too.

"6. Under the law the ship was responsible in the first instance for the proper construction of the feeder and a similar duty rested upon the ship to maintain the feeder in a reasonably safe condition."

I will affirm that.

"7. The fact that the feeder and the shifting [209] board were only semi-permanent structures does not make the feeder and its appurtenant parts any the less a part of the equipment furnished by the ship to the employees of Haenn."

I will affirm that.

"8. When the ship turned over the feeder with the stage plank already constructed inside it for the purpose of being used to install or repair the burlap lining of the feeder, the Haenn Company and all of its employees were entitled to assume that the stage plank was in normally fit condition to be used for the purpose for which it had been installed."

That I will deny.

"9. The fact that the stage plank gave way under the circumstances which have been shown here is itself sufficient evidence that the stage plank was weak and not sufficient for the purpose for which it had been intended. If you find that the ship furnished such equip-

ment then your verdict must be in favor of the Haenn Corporation."

I will deny that as drawn.

"10. Before you may find against Haenn you must be satisfied by a fair preponderance of the evidence that Haenn or its employees other than Baccile were [210] careless or negligent and that this carelessness or negligence caused or was a substantial contributing factor to the accident. The law defines legal cause as some breach of duty which is a substantial factor as well as an actual factor in bringing about injury. In this connection it is not enough that the accident would not have occurred had there not been negligence. That in itself is not sufficient."

That I will affirm.

MR. MOUNT: Your Honor, I except to the last sentence.

THE COURT: You may have an exception.

MR. MOUNT: Thank you, sir.

THE COURT:

"11. The uncontradicted evidence in this case is that the Captain of the Vessel, Kuipers, knew that the grain feeders had been damaged during unloading of the ship at Rotterdam. There is no evidence that anyone on behalf of the ship warned or notified the Haenn Company or any of its employees of this fact and the only evidence before you is that the Haenn Company was instructed by Captain Campbell acting on behalf of the ship, to repair the torn burlap in the No. 2 feeder. There is——"

Right there, wasn't there also the instruction with respect to the plankings?

[211] MR. BYRNE: Not then.

THE COURT: That the plankings——

MR. BYRNE: No, Your Honor, not No. 2 hatch.

MR. MOUNT: They had to replace the shores of the lower part.

THE COURT: What?

MR. MOUNT: They had to replace the shoring down in the lower part of the hold.

THE COURT: The whole thing was that the captain Campbell, said to make it grain tight.

MR. BYRNE: The only thing that he said about No. 2 feeder, sir, was to tack up the burlap. That is the reason, of course, for my ground for my points of binding instructions.

THE COURT: All right.

"There is a duty to warn a person who comes upon a vessel of a danger which is known to the shipowner or the Officers of the ship and unless you find as a fact that the Haenn Company knew that there had been damage to the No. 2 feeder aside from the tearing of the burlap, your verdict must be for the Defendant, Haenn."

That I will deny as drawn.

"12. In this action the Defendant, Halcyon, has the burden of proof and it must prove by a fair [212] preponderance of the evidence that the Haenn Company was negligent so as to have caused or substantially contributed to the accident. If the evidence does not satisfy you or if you find that the evidence is evenly balanced, then your verdict must be for Haenn."

That is affirmed.

MR. BYRNE: Your Honor, may I have exceptions to such of Mr. Mount's points as you have affirmed?

THE COURT: Yes.

MR. BYRNE: And such of my points as have been denied?

THE COURT: Yes.

MR. MOUNT: And I understand that I have similar exceptions to the denial of my points?

THE COURT: That is right.

* * *

[213] MR. BYRNE: Judge McGranery, of course, that parenthetical clause at the end of my suggested question under 2, it is my view that that is the law, and I would now ask the Court to charge the jury to that effect; in other words, that in determining the question of negligence the jury may not charge the Haenn Corporation with any negligence that they may find on the part of Baccile, the original plaintiff.

THE COURT: You said that at the top, you said that in number 1——

> "Were the employees of Haenn Ship Ceiling and Refitting Corporation negligent so that they caused or substantially contributed to the injuries sustained by the Plaintiff Baccile?"

MR. BYRNE: I do not think that makes it clear. I do not think that makes it clear that we are not responsible for Baccile's negligence.

MR. MOUNT: Legally there is no doubt about what you are. So far as we are concerned he is just as much an employee of yours as anybody else.

MR. BYRNE: I will dispute that.

THE COURT: That is one of the propositions that we have in submitting, as we have, under our terms of settlement, to this jury; in other words, we have precluded ourselves from permitting this jury to in any wise mitigate [214] its verdict in favor of the company by figuring out some comparative negligence on the part of the actual original plaintiff himself.

MR. BYRNE: I think you have to instruct the jury, to make the record clear, Judge McGranery—may I do this,

with respect to these suggested interrogatories which have been submitted by me on behalf of the Haenn Corporation, may I withdraw the parenthetical phrase at the end of question 2?

THE COURT: Yes.

MR. BYRNE: And instead request that you instruct the jury that they may not find the Haenn Corporation responsible on the ground of any negligence on the part of the plaintiff Salvadore Baccile. If you want to deny the request, as I gather is Your Honor's thought, that is perfectly all right, but I wanted to make the request so that our record is clean.

THE COURT: So that we can clear up what we have in our own respective minds. If you follow that out, suppose one of the members of the jury had an idea that a Jacob's ladder should have gone over that side, and that Baccile should have gone down that ladder and looked under the burlap to see if the cleat was secured, and would attribute that negligence to Baccile [sic Haenn]. You and I know, strictly speaking, [215] that with his foreman up there tapping the ladder, and with the foreman saying what is to be done, Baccile would only do what the foreman instructed him to do. For that reason I do not think it would be fair to submit it in that fashion to the jury. I am going to say to this jury that if this accident happened as the result of the sole negligence on the part of the Haenn Corporation, then, unless that negligence might be attributed to some breach of the contract between the Haenn Corporation and the ship owners, you are out. Then you are in clear. That is my view of the law. I think this case has received everything that could be possibly be given to it from both sides. I have never seen a case more ably tried with such difficulty of getting in and around what I think were certain hazards. We have all had to be careful, tiptoeing around things here, but I think a little thing like that might well confuse the whole issue in the minds of the jury. I know what you are

interested in is, what is the strict cold law here, and we have eliminated from the beginning any feeling of sympathy or anything else. Number 1, what is the negligence between you folks? We saw that contract, which, unfortunately, was an oral contract, but it has been related by very intelligent and very forthright witnesses. I think the witnesses for Haenn were absolutely forthright in everything they had to say about it. I think the captain of the vessel and Captain [216] Campbell were. I think we can afford to let this go pretty safely to the jury without confusing them.

MR. BYRNE: Your Honor, not to change the subject, but there is something that is uppermost in my mind, and that is how may we——

THE COURT: Argue this question to the jury?

MR. BYRNE: Yes, sir.

I suppose Your Honor knows that there has been a newspaper account of the fact that this case was settled.

THE COURT: No, I am not aware of it.

MR. BYRNE: Oh, yes, I read it myself personally in the Evening Bulletin for, I believe, either Wednesday or Friday night.

THE COURT: You want me to ask the jury if they have?

MR. BYRNE: No.

I think I should be permitted to say to this jury that judgment has been entered against Halcyon and in favor of Baccile. I do not care whether I mention the amount or not.

THE COURT: I do not see too much harm in that.

MR. BYRNE: I think I should also be permitted to say that normally the obligation of the Haenn Corporation to Baccile is covered by the applicable compensation statute, [217] and that that has been done in this case. As I understand it, that has not been disputed of record, and that is

the only reason I did not prove it, that Haenn did secure the payment of compensation, as it must under the Act.

You do not dispute that, Mr. Mount?

MR. MOUNT: No.

THE COURT: The question you get into here, Mr. Byrne——

MR. BYRNE: I will not mention anything Your Honor tells me not to.

THE COURT: I recognize that. What is the actual effect? As I said before, we are trying the cold legal view of it. You have some humanity, if you want to term it that, on the part of the insurance carrier, where they had gone right ahead, they had paid Mr. Baccile his compensation, they had engaged doctors to effect his cure, if it were possible. They gave him every possible medical attention, and they footed the bills.

What is the cold legal picture? The very moment that Baccile elected to sue, your remedy was what? Cut off the compensation, cut off everything; he elected to do that, Baccile elected to do that. What you have done has been a gratuitous thing.

MR. BYRNE: No, Your Honor, I am sorry, for [218] one year it was not gratuitous, it was a compliance with our legal obligation, and I do not want to paint a picture of a tender insurance company being merciful, that is not my idea at all.

THE COURT: I can rely on you for painting the picture in the most favorable fashion that the intellect of one who has a gift of the English language can present to this jury.

MR. BYRNE: You do me much too much honor, Your Honor.

They must know in their own human experience that there is such a thing as a compensation act.

THE COURT: I think that.

MR. BYRNE: I do not think they ought to be under any misapprehensions that Haenn failed in that obligation. Now, if Your Honor will say to them or permit me to——

THE COURT: I do not think they will.

MR. MOUNT: If the Court please I think that all we ought to say here is that by agreement of all parties, and without any prejudice whatever, this settlement has been agreed upon.

THE COURT: You answer that pretty much yourself, Mr. Byrne, when you say that you feel that all of these jurors recognize that there would be a compensation act, that he would [219] be entitled to compensation, and that you would not want them to think that you failed.

MR. BYRNE: That is right. Normally you just do not have an employer in under a lawsuit such as this. This is the first one in my experience.

THE COURT: It is my view that that likewise ought not to be what the jury might think. We ought to go to the jury on the cold proposition, that here were feeders that were placed in the ship at Montreal, the custom and manner were explained by the master of the vessel, the captain of the port underwriters authority, and Baccile who had worked on them for a number of years, all of that ought to go to them, and leave out the question of whether one failed in his duty. You went beyond your duty. Do you want me to say that to the jury?

MR. BYRNE: No.

THE COURT: Because the day that Baccile started suit you could say, all right, Mr. Baccile, from this day forward, you have no further compensation, and you have no further payments on account of medical cure, you are on your own. That was your power, you did not do that, you had a bigger heart than that. You are not being penalized I think, but you are not going to inject something into the case that does not belong there.

[220] MR. BYRNE: Your Honor may say to me, Mr. Byrne, you may not mention workmen's compensation in substance; that is all right, Judge McGranery.

THE COURT: I think you can say, I think I would say, too, that one of the reasons you must find, to use your own language—I think something to the effect that it is not just negligence, but that it is a contributing factor in a substantial manner to the injury, your negligence, before you are charged with it.

MR. BYRNE: That has nothing to do with whether I may mention compensation to the jury.

THE COURT: That is why.

MR. MOUNT: I do not think you ought to mention it, because compensation has nothing to do with the issue which we are going to ask the jury to find.

MR. BYRNE: There is no actual factual dispute in my mind that this jury will resolve.

THE COURT: I will overrule you on that and grant you an exception.

MR. BYRNE: Is that just for the compensation?

May we say to the jury—I think that is the law of this case—there has been a judgment entered here, and I would like to certainly say that, and to make what argument I may from it.

[221] MR. MOUNT: It has to be said that it was without prejudice and by agreement of all parties.

MR. BYRNE: What do you mean? I agree that you did not prejudice yourself. I think you did a great job by settling, frankly, the more I see of Nick Baccile.

MR. MOUNT: As between us two defendants, it is not an admission of liability as between us two.

MR. BYRNE: It is an admission by you of liability.

THE COURT: It is not an admission on your part.

MR. BYRNE: It is an admission by me when I state it was a proper amount. We may so state to the jury?

THE COURT: I think so.

MR. MOUNT: I have no objection to the jury knowing.

THE COURT: Compensation ceased the date that Baccile started suit, that was your right to stop it.

MR. MOUNT: I think that that question, sir, is completely irrelevant.

THE COURT: It would be somewhat of a double-edged sword.

MR. BYRNE: Your Honor has ruled, I am not pressing it, you have ruled I may not mention compensation.

THE COURT: I think, however, it would be fair [222] for you gentlemen to say that a judgment had been entered in this case by mutual consent, by which neither one of the defendants prejudiced the rights either of himself or the other; you are presenting this to the jury.

MR. BYRNE: I am sorry, sir, the judgment has not been entered against my client.

THE COURT: It will be entered against Halcyon Lines.

MR. BYRNE: That is the way it is.

THE COURT: It was by agreement, and the agreement does not determine anything other than that Baccile gets that which the judgment says he is to have.

MR. BYRNE: I think it is a fair amount.

THE COURT: Yes. I think that is the issue solely.

MR. MOUNT: What are you going to do, ask the jury to answer these questions?

THE COURT: I think that would be sufficient.

MR. MOUNT: Without bringing in a general verdict?

THE COURT: There would have to be a general verdict.

MR. BYRNE: I think you ought to mold the verdict in this case. You have the legal question about which [223] Mr. Mount and I do not agree as to whether or not this jury may apportion this verdict by percentages, or whether once they find negligence on the part of the two parties, it is not automatically apportioned fifty-fifty by law. I do not agree that Mr. Mount is right. That is something for us to argue before you alter the verdict. It could be moot.

THE COURT: There is that likelihood of its being moot.

* * *

[224] MR. BYRNE: You divided it there clearly as to each party. That is the rule.

MR. MOUNT: No question in that case.

THE COURT: Let us see what this jury does with this.

* * *

CHARGE OF THE COURT.

McGRANERY, *J.*

Members of the jury, without resort to prophecy, it looks as though we have come to the end of this case. The presentation of the evidence and the summing up of that evidence for your benefit ends it so far as the litigants themselves are concerned. It now reaches a point where the Court and the jury will begin their respective tasks. I shall discuss very little of the evidence. I do not propose to go into it at any length, because the actual evidence is strictly your province.

However, in order to orient your minds properly so that it will be before you in one, two, three, order, this is an action brought by Salvadore Baccile against the Halcyon Lines, Vinke and Company, who you will understand are the owners of the ship. Having been sued by Mr. Baccile, they in effect say: "We are not responsible," or, at least, "We are not solely responsible. This accident happened as a result of the negligence of Haenn Ship Ceiling and Refitting Corporation who were the employers of Mr. Baccile."

As you may know, under the law, if Mr. Baccile were injured in the regular course of his employment as a result of the negligence of his employer, he, of course, would be relegated to a remedy under the compensation law, but here, Mr. Baccile elected, as he had a right to do under the law, to sue Halcyon Lines, Vinke and Company, who, in effect, say: "No; we made a contract with the Haenn Ship Ceiling and Refitting Corporation and the injury resulted from the negligence of Haenn Ship Ceiling and Refitting Corporation, and although we owed him the duty of providing him a safe place in which to work, the Haenn Corporation owed us, the shipping line, the duty of performing that work in a safe manner."

You see, therefore, although there has been an agreement concerning the money to be paid Mr. Baccile, the shipping line says: "Under our contract we have a right to sub-

mit to the jury the question of whether or not we were solely responsible, whether or not the Haenn Corporation was solely responsible, or in what percentage the responsibility may be divided. A little later I will touch directly on that point.

In order to have an overall picture, you will keep that in mind as the beginning of the action, the point from which we start. That is the basis of it. They have a right to determine that issue in this Court under federal law because the Halcyon Lines use our ports. While it is a foreign vessel, it has every standing before you that a citizen would have; it has every right to expect from you a just verdict.

Having in mind the parties to the action, we may move then to a consideration of how you as jurors act. What causes you to act? What will you give consideration to?

Of course, in all of this, you will act in accordance with the solemn oath or affirmation which you took at the outset to well and truly try this case and to render a just verdict under the evidence as it may come from the witness stand the law as I give it to you.

First, as jurors, you are the sole judges of the facts.

This action is based upon negligence. Negligence is the basis of the action; not the mere happening of an accident. Some times there are what people call "pure accidents." They happen. They happen, and only God knows why. No one is entitled to compensation—not in this life at least—under those circumstances.

The burden is upon the person attempting to show the negligence. In this case, the third party plaintiff, the Halcyon Lines, has the burden of proving to you by a preponderance of the evidence the negligence of the Haenn Ship Ceiling and Refitting Corporation. If they can not prove that by a preponderance of the evidence, then, of course, there would be a verdict in favor of the third party defendant, and that would be the end of the case.

You will consider the evidence as it came from the stand, and of that you are the sole judges. If I make ref-

erence, during the course of my charge, to the evidence, and your recollection is at variance with mine, you will quickly disregard what I say with regard to it and rely upon that which you firmly believe it to be, because its effect is upon your conscience and not upon mine.

While you are the sole judges of the evidence you will, however, take the law from the Court no matter how unfairly you seem to think that I might state it to you, and you will apply that law to the facts as you have heard them in arriving at a just and proper verdict.

You will likewise be the sole judges of the credibility of the witnesses. What do we mean by "credibility of witnesses?" What is the standard that you as jurors will apply as a test of one's credibility? It is pretty much as though, members of the jury, a man walked into your home or into your office and sat down and related a proposition to you which was a very serious matter: How would you treat it? How would you regard the story that he gave to you? What are his qualifications to relate the story to you? What is his ability, as it were, to know exactly what happened? What position did he occupy? In what manner does he relate it to you? Does he appear to be absolutely forthright in trying to give you the whole truth as he saw it happen?

Sometimes people do not intentionally mean to perjure themselves or to lie, but we record things differently.

Incidentally, I might say to the thirteenth juror, the supernumerary, that as I finish my charge she will step out and will no more be a part of the jury. There are only twelve to deliberate, and you will not go to the jury room with the jury.

How do they seem to answer? Do they haggle with the questioner? Do they come right out in forthright manner and tell you exactly what happened as they saw it, or as they say they saw it, or do they parry? They are the various tests you will apply.

What interest does a witness have in the outcome of the case? That, too, is important. Would the interest of a particular witness be such as to cause him to tend to color his testimony?

In other words, generally speaking, if somebody walks in and tells you a story, how do you regard it after he is all through? When he walks out do you say in your mind that that fellow is a big wind; that he was in no position to see what he related and that he doesn't know what he is talking about?

On the other hand, would you say that that person has given a very forthright story, that by reason of his intelligence, by reason of his experience and know-how, he is in a position to tell you just exactly what happened? They are the things, the sort of little tests, that you would apply in determining whether or not the credibility of a witness satisfies you. You are the sole judges of that. If you should find that a witness were to lie, and you feel that he did so knowingly or wilfully—and I don't think there is anything like that in this case—you would disregard the whole of his testimony or her testimony.

This case has been very ably presented by counsel on both sides. who have, I think, tried to arrive at a very proper determination of the rights of the parties. I see no indication that there has been any holding back of testimony or any hedging about it. You seem to have the whole case, as I regard it from here, very ably presented by both sides.

It comes down to the question of negligence. Who was at fault? Mr. Baccile is out of it. What is the story with respect to the rights of the various parties under our law? I say to you, and I say it to you as the law and it will be binding upon you, that there was a duty upon the shipowner to provide a safe place for the employees of the Haenn Company to work; but by the same token it was the duty of the Haenn Company to see that the work was performed safely.

You heard the terms of the contract between the ship owners through the man from Lavino and Company, the shipping agent in this port for the Halcyon Line. He testified that he, in turn, at the direction of the captain, ordered Haenn to do certain work, but we will concern ourselves strictly with this number 2 hold or feeder; we are not concerned about the contract beyond the number 2 hold, but only as it relates to the number 2 hold.

What is the picture that the evidence presents? It shows that this particular feeder was erected in Montreal, Canada, that a load of grain was poured into the ship, that it was carried to and discharged from the ship at Rotterdam; that the ship returned in ballast—and you know what that is—something to sort of keep the ship a little steady when she is coming back otherwise empty. Some times they use water; some times they use other things. There is no evidence here as to what they used, but she came back in ballast, and you may infer from the evidence that the hold was empty, because the ship's crew entered number 2 feeder, cleaned it out—swept it out, as it were.

You have the testimony of the captain as it was reported to him by the boatswain, and you also have the deposition of the boatswain which was read to you, to the effect that he, during the crossing, took part of the crew into the feeder, went down there and swept it out; so that the contract between the ship owner, through its agent Lavino and Company, and Haenn Ship Ceiling and Refitting Corporation, was to go aboard the ship and there to meet Captain Campbell. Captain Campbell described himself as the one representing the ship underwriters in charge of the Port of New York, and apparently Philadelphia is considered a part of that port for their purposes. He was aboard the ship. The chief officer and he went around the ship. Captain Campbell said that there had to be other fittings put in there, and in the crossing certain damage had been done to the number 2 feeder so that in some way or other the burlap became loose. The purpose of the burlap,

was to keep the feeder grain-tight. The rough boards which they used, not being nailed in, as he described them, or fitted in close, would have a tendency to let grain force its way through the crevices, therefore the burlap came down and prevented just that from happening. In this particular feeder it was to make the burlap fast that the Haenn folks were employed.

You will understand that Captain Campbell and the ship's master both testified that these feeders were no part of the ship's structure, but were to be created only for the purposes of carrying grain cargo and distributing it over the ship in an even manner so as to prevent the ship from tipping over in a rough sea.

It is not clear as to who put the staging or the plank in this number 2 feeder, but it is clear from the evidence of the master and from the evidence of Captain Campbell that it was to be used for the convenience of the men working in that feeder.

When they came aboard the ship, first the general superintendent, Mr. Knopf, I think, walked about the ship with Captain Campbell. They discussed the things after the chief officer had discussed them with Captain Campbell, and it then became Captain Campbell's duty to give the instructions, and he gave those instructions to Haenn's general superintendent aboard the ship.

Following that, there was a telephone call made, and the contract required Haenn and Company to furnish the men and material. You will remember that precisely. The ladder that came aboard and the lumber that was to be used were brought aboard the ship by the Haenn Company. Everything was furnished by the Haenn Company except, I think he said, the saws which the men themselves were required to carry, their own employees.

Finally the evidence shows that the foreman and Mr. Baccile came to the number 2 feeder and they put a ladder down, and they used the ladder with the legs or sides of it astride the staging, and by the bottom rung tapped in the

forward part—or, I believe, the after part here—and then in the middle, to find about the security of it. They didn't know what it was resting on.

Number 1 for your consideration is: When the ship's crew under the direction of the boatswain of the vessel went into the feeder to clean it out, he said there was no staging there. Is he mistaken? Was the staging there? What was the condition of the staging? Obviously he didn't inspect it, because he said it was not there. If under careful examination it certainly could have been ascertained that the staging was there, by looking in—if having seen it there, with this torn burlap in whatever way it was hanging there, both ends of the planking or staging being covered so that what it was resting on was not visible to the eye, was there a duty to look under there and find out? You have got to determine that.

When we come to the Haenn folks, the foreman who made those testings said that he did not believe there was any duty; there was no custom about it; but, members of the jury, we have to act as prudent persons. The law has no regard for foolish persons; we must act prudently under the circumstances. Would a prudent person tap that at one end, and in the middle, with the bottom rung of the ladder, not seeing what it was resting upon, and say, "Go down there and straighten it out"? Or would a prudent person say, "What is at the other end of that?" It is all right about its not having a hollow sound or a cracked sound—what is that resting on, number 1? And is it secure? There is no evidence about that here, yet that is the end that gave way—the cleat, as they call it, which was a strip of planking, a narrow strip of planking, put up there to hold this staging.

Would a reasonably prudent person under those circumstances want to go down and life up that burlap in some manner other than by placing a ladder on the planking to find out? There is quite a space below after you leave the bottom of that ladder.

Members of the jury, they are questions that you and you alone must determine. You will determine what the relationship was between the ship owners and Mr. Baccile. Were they negligent? Were they entirely at fault? Or did their negligence contribute in any substantial manner to the injury suffered by Mr. Baccile?

Likewise, you will consider under the terms of the original contract between Haenn Company and the ship owners what their relationship was. The law says that they owe a duty to the ship owner to perform this work in a reasonably safe manner. Did they act reasonably, safely under the circumstances? And in all these questions you will regard them as "under the circumstances."

Negligence—you all know what it is. Negligence is the doing of something that a reasonably prudent person would not do under the circumstances, or the failure to do that which a reasonably prudent person would do under the circumstances. That is our law. That is the standard. That is your guide.

This case does not pose any peculiar difficulty. It presents, however, a very serious question for your determination: What are the rights of these two parties? Who was responsible for the occurrence of this accident?

I propose to submit two very simple questions that you might well answer. One of them will be: Did the Haenn Company through the negligence of its foreman or agent substantially contribute to the injury suffered by Mr. Baccile?

If your answer to that is "no", and that this happened solely as the negligence of the shipping company, that would be the end of the case; but if your answer is "yes", the second question that you will answer is: What percentage did the negligence of each contribute to the full accident suffered by Mr. Baccile? Is that fairly clear to you, members of the jury?

Your verdict, of course, will be unanimous. All twelve of you will have to agree on your verdict. And, members

of the jury, I do not think I need remind you that while you have given a great deal of your time, and certainly your very intelligent attention as I have observed you from here to what has been going on, you will give this your serious consideration because, after all, we are the last place on this globe where two parties can come in and present to a jury of twelve disinterested persons whose interest will be the preservation of our free institutions and the right, if we ourselves find ourselves in the same predicament some day, to have our rights determined.

Therefore in considering this you will have no other consideration in your minds than the evidence that you heard; you will apply to it the law as I gave it to you, and let the chips fall where they may. You can then walk out with your heads high. You will not have to worry about whether you did the right thing or the wrong thing. If you do what your conscience tells you to do under the law as you heard it from the bench and the evidence as you heard it from the witness stand, take the law as I give it to you and apply it to these facts. By so doing, you won't have to worry a bit, and you will make a contribution to this great system that we live under. It is free. That is our only consideration. We are not going to be concerned about whether it is a Dutch line or an Indian line. If it did not have the right to come into our Court it would not be here. Having that right, you and I will preserve that right. That will be our only consideration.

Members of the jury, I have been asked by both sides to charge you, and what I read I will read to you as I believe it to be the law. I will take the third party plaintiffs first. The third party plaintiffs asked me to charge you that there was a duty on the part of the Haenn Ship Ceiling and Refitting Corporation, the employer of the plaintiff, Salvadore Baccile, to make inspection and examination of the parts of the grain fittings which it had undertaken to repair, to furnish competent foremen and other persons to supervise the work, and to perform the work of repairing the grain

fittings in the vessel in a careful and proper manner in order to prevent injury to the plaintiff. That is the law.

The Haenn Ship Ceiling and Refitting Corporation was under a duty to the vessel owners to perform the work of repairing grain fittings in the vessel in a careful and proper manner: That is the law.

The duty which the vessel owner owed to Salvadore Baccile, as a business guest, was to furnish him a reasonably safe place in which to work, and to make inspections and examinations to ascertain the condition of the parts of the ship which he and his employer were engaged in repairing. That is the law.

Where the vessel owner has given over a part of a vessel to an independent contractor engaged to perform work in that part of the vessel, the vessel owner has no duty to supervise or control the manner in which the independent contractor and/or his employees perform the work, with the understanding that we have stated before, that there was a duty, if they knew, to advise the Haenn people—if they knew.

If you find that the ship owner and the Haenn Ship Ceiling and Refitting Corporation both failed to make proper inspections to determine whether the grain feeder in which the plaintiff was to perform his work was safe, they were negligent, and you will determine the extent or percentage that the negligence of each contributed to the accident. That, I think, is clear.

Now, the third party defendant, members of the jury, has asked me to charge you that under the law the ship was responsible in the first instance for the proper construction of the feeder and a similar duty rested upon the ship to maintain the feeder in a reasonably safe condition. That is true, but, after all, they were aboard it to repair the damaged burlap.

The fact that the feeder and the shifting board were only semi-permanent structures does not make the feeder and its appurtenant parts any the less a part of the equip-

ment furnished by the ship to the employees of Haenn. That is true.

Before you may find against Haenn you must be satisfied by a fair preponderance of the evidence that Haenn or its employees other than Baccile were careless or negligent, and that this carelessness or negligence caused or was a substantial contributing factor to the accident. The law defines legal cause as some breach of duty which is a substantial factor as well as an actual factor in bringing about injury. In this connection it is not enough that the accident would not have occurred had there not been negligence. That in itself is not sufficient. That, members of the jury, I explained to you with "preponderance of the evidence," and with "burden".

In order to warrant a finding that negligence is the proximate cause of an injury it must be shown that the injury was the natural and probable consequence of the negligence or wrongful act and that substantial harm should have been foreseen before the accident in the light of the pending circumstances. You can not go wrong in keeping that thought with you always, throughout your whole deliberations.

In this action the defendant, Halcyon, has the burden of proof, and it must prove by a fair preponderance of the evidence that the Haenn Company was negligent so as to have caused or substantially contributed to the accident. If the evidence does not satisfy you, or if you find that the evidence is evenly balanced, then your verdict must be for Haenn.

Gentlemen, is there anything?

MR. BYRNE: There will be certain exceptions, I am sure.

THE COURT: Do you have anything to say, Mr. Mount?

MR. MOUNT: No, sir; not to the charge as given aside from the points that we have had rulings on before.

THE COURT: Yes, gentlemen, we have taken that up and discussed it.

MR. MOUNT: Yes.

THE COURT: You each have exceptions there.

MR. BYRNE: I understand that, Your Honor.

THE COURT: Do I have that interrogatory?

MR. BYRNE: Do you wish to hear exceptions now or after the jury has gone out?

THE COURT: I will hear them now and correct them if I can.

(Conference at side bar reported as follows:)

THE COURT: Here are the interrogatories.

MR. BYRNE: Your Honor, these are just general exceptions to your charge.

THE COURT: Yes.

MR. BYRNE: I except to so much of the Court's charge as defined the issues affirmed by the pleadings and the judgment which has been entered against the defendant Halcyon.

I except to so much of the Court's charge as indicates that negligence is the only issue in this case. It seems to me that unseaworthiness is also just as much a part of this case.

THE COURT: I will overrule you on that. Seaworthiness has no part in here.

MR. BYRNE: I really have to take these exceptions. I would just as soon take them out of the hearing of the jury. At two places during the Court's charge you spoke to them about how they would interpret the contract. I say to you, sir, that the interpretation of any contract is for the Court, and there is no material conflict as to this contract. I say that the interpretation of this contract is not for this jury, but it is for this Court.

THE COURT: All right; I think I will go that far. It is an oral contract, and I think I will tell the jury that there

is no material conflict between the parties with respect to the contract.

MR. BYRNE: What is the contract? I think the Court has to tell them that.

THE COURT: What is that?

MR. BYRNE: I think the Court has to tell them what the contract is.

THE COURT: I will tell them, if you want me to repeat it.

MR. BYRNE: My judgment is that as far as number 2 feeder is concerned, the contract is merely to tack up the burlap.

THE COURT: Well, the whole thing was to make it grain-tight. Make it grain-tight. What is the use of getting into that? I think I will let it alone.

Do you feel there is any real error in that?

MR. MOUNT: No. I think you might say to them that there is no material difference between the parties as to what the contract was.

THE COURT: This is like everything else—I made some notes in anticipation of charging tomorrow morning. What I gave them now was right out of my mind.

MR. BYRNE: I would also except to so much of the Court's charge as referred to the feeders and whether they were or were not a part of the ship's structure. The evidence in this case, it seems to me, is only that they were not a permanent part of the ship's structure. I think they were a part of the ship's structure as it was furnished to the Haenn Company.

THE COURT: I have said that its purpose was to haul grain. That is the only purpose that it served.

MR. BYRNE: I understand.

MR. MOUNT: That was covered in one of your points which was affirmed.

MR. BYRNE: You also said that Rickert did not stop to find out about the security of that plank, and I believe that his only purpose in tapping it was to find out whether it was cracked.

THE COURT: Yes, I said that, Mr. Byrne.

MR. BYRNE: I think Your Honor referred to Rickert and his test as foolish. I except to that portion of Your Honor's charge; and I also except to that portion of the charge which makes reference to the Haenn people going down to lift up the burlap and examine the cleat.

You also referred at one point to the fact that the question here was whether Halcyon and Baccile were entirely at fault or whether the Haenn Company was also at fault. I don't think that is the issue here.

THE COURT: No, no; did I say Halcyon and Baccile?

MR. BYRNE: Yes, Your Honor, you did.

THE COURT: Then I will correct that, because the issue is between Halcyon and Haenn Ship Ceiling and Refitting Corporation.

MR. BYRNE: You read to the jury this afternoon Mr. Mount's, or the third party plaintiffs', point number 4. This morning you indicated it was denied.

THE COURT: Yes.

MR. BYRNE: And you also commented.

MR. MOUNT: Well, he modified it.

THE COURT: Yes.

MR. BYRNE: You also commented after the first one of my points which you read, and you said, "But bear in mind this," and to my mind you completely withdrew the point.

THE COURT: What I read was this: "Under the law the ship was responsible in the first instance for the proper construction of the feeder and a similar duty rested upon the ship to maintain the feeder in a reasonably safe condition."

MR. BYRNE: Then you went on from that point and said, "But, ladies and gentlemen——"

THE COURT: That is right. That is right.

MR. BYRNE: I don't think you affirm points that way.

THE COURT: Why not? For your purposes, that is——

MR. BYRNE: I am asking an exception.

THE COURT: All right; I will say that I have extended by way of explanation point number 6 which I affirm, Mr. Byrne.

MR. BYRNE: That is right.

THE COURT: All right.

MR. BYRNE: I have said my piece.

THE COURT: The only thing for me to correct, then, would be to tell this jury, if I have said that they are to consider the negligence, you say, of Mr. Baccile and the Halcyon Lines——

MR. BYRNE: As I noted it, sir, I thought you said that the question for their determination here is whether Halcyon and Baccile were entirely at fault, or whether Haenn.

THE COURT: Yes——

MR. BYRNE: There is this, too, Judge McGranery. I most respectfully say that I do not understand the issue which you are submitting to this jury. Is it whether there was due care on both sides?

THE COURT: That is right.

MR. BYRNE: Or due care only on the part of Haenn.

THE COURT: Due care on both sides. I think I made it quite clear to the jury that the issue is that there was a duty on the part of the ship owner to furnish Baccile a reasonably safe place to work——

MR. BYRNE: Yes, I agree with that.

THE COURT: —there was a corresponding duty over, then, from the Haenn Company to the ship owner to do the work in a reasonably safe manner, and that that was their issue. Now, if they determine that the ship owner was solely liable, that is the end of the case.

MR. BYRNE: That is right.

THE COURT: If not, if the duty which the Haenn Company owed to the ship owner had been breached in that they had not performed it in a reasonably safe manner, there, I think, is where I used the words "foolish business." They would say what amount, what percentage. I think I used that.

MR. BYRNE: Yes.

THE COURT: Is that the issue? Do I make that clear as to how I am sending it to the jury?

MR. BYRNE: Oh, I think this is probably so, Judge McGranery.

(End of conference at side bar.)

THE COURT: Members of the jury, if I have made any reference to you with respect to the issue here as one in which you would consider negligence of Mr. Baccile along with the negligence of the ship owners, please disregard that. The issue is very simple. The issue is: Under the law Mr. Baccile was entitled to be furnished by the ship owners with a safe place in which he could perform this work. The Haenn Company had a corresponding duty over to the ship owners that they perform this work in a reasonably safe manner, and all of that will be determined with the full picture of all of the circumstances, bearing in mind that the standard of mentality used by the law is that of a prudent man. Under the circumstances, what would he do?

Now is that clear, members of the jury? If it is, then I have this interrogatory:

"Were the employees of Haenn Ship Ceiling and Refitting Corporation negligent so that they caused or substantially contributed to the injuries sustained by the Plaintiff Baccile?"

You will answer that "yes" or "no".

If your answer to that is "yes", then state the percentages by which the original defendant Halcyon and the third party defendant Haenn were negligent so as to contribute to the injuries sustained by the plaintiff.

Then we have a little line, "Haenn Ship Ceiling and Refitting Corporation," and the percentage.

"Those in charge of the S. S. 'Stad Vlaardingen'" and the little line for the percentage.

That, members of the jury, is the case as simply as I know how to state it to you. Our additional juror will drop out, and you twelve will take this and give it the careful consideration that it deserves, because this is the only day these parties will have in Court to present this issue for your determination.

Do the jurors want that model of the ship section? You may have it if you want it for any reason. I don't think there are any other exhibits.

MR. MOUNT: There are photographs.

THE COURT: All right, members of the jury, you may have whatever there is here in evidence. You may take it with you into the jury room for your deliberations.

(The alternate juror was excused.)

(The bailiff was duly sworn.)

(At 3:37 the jury retired to commence deliberations, taking with them the following exhibits: TP1, TP2, TP3, TP4 and TP5.)

(Third party plaintiffs submitted the following points for charge:

"1. There was a duty on the part of Haenn Ship Ceiling and Refitting Corporation, the employer of Plaintiff Salvadore Baccile, to make an inspection and examination of the parts of the grain fittings which it had undertaken to repair, to furnish competent foremen and other persons to supervise the work, and to perform the work of repairing the grain fittings in the vessel in a careful and proper manner in order to prevent injury to the plaintiff.

2. The Haenn Ship Ceiling and Refitting Corporation was under a duty to the vessel owners to perform the work of repairing grain fittings in the vessel in a careful and proper manner.

3. The duty which the vessel owner owed to Salvadore Baccile, as a business guest was to furnish him a reasonably safe place in which to work, and to make inspections and examinations to ascertain the condition of the parts of the ship which he and his employer were engaged in repairing.

4. Where the vessel owner has given control of a part of the vessel to an independent contractor engaged to perform work in that part of the vessel, the vessel owner has no duty to supervise or control the manner in which the independent contractor and his employees perform the work.

5. If you find that the ship owner and the Haenn Ship Ceiling and Refitting Corporation both failed to make proper inspections to determine whether the grain feeder in which the plaintiff was to perform his work was safe they were negligent, and you will determine the extent or percentage that the negligence of each contributed to the accident.")

(Third party defendant submitted the following points for charge:

"1. Under all of the evidence your verdict must be for the Third Party Defendant, Haenn Ship Ceiling and Refitting Corporation.

2. The Original Defendant, Halcyon Lines, has settled the claim of Baccile against it by agreeing to the entry of a judgment in favor of Baccile and against Halcyon in the sum of Sixty-Five Thousand Dollars ($65,000.00).

Halcyon, having settled with Baccile, is here suing Baccile's employer, Haenn, in order to recover a portion of the payment it has made to Baccile. Halcyon can recover in this suit only if you find as a fact that Haenn was careless or negligent in some way which either caused or substantially contributed to Baccile's accident.

3. Halcyon would be liable to Baccile only if it had been itself at fault and you are entitled to consider that fact in determining whether there was any negligence on the part of Haenn separate and distinct from the negligence of Halcyon and if you further find that the negligence of Haenn was a substantial factor in contributing to Baccile's accident.

4. The shipowner, Halcyon, owed to Haenn and to all of Haenn's employees a non-delegable duty to furnish them with a reasonably safe place in which to perform their work.

5. If you find that the stage planking in the No. 2 feeder was placed there with the intention that the men should work upon it and you further find that Haenn relied upon that fact, then your verdict must be in favor of Haenn.

6. Under the law the ship was responsible in the first instance for the proper construction of the feeder and a similar duty rested upon the ship to maintain the feeder in a reasonably safe condition.

7. The fact that the feeder and the shifting board were only semi-permanent structures does not make the feeder and its appurtenant parts any the less a part of the equipment furnished by the ship to the employees of Haenn.

8. When the ship turned over the feeder with the stage plank already constructed inside it for the purpose of being used to install or repair the burlap lining of the feeder, the Haenn Company and all of its employees were entitled to assume that the stage plank was in normally fit condition to be used for the purpose for which it had been installed.

9. The fact that the stage plank gave way under the circumstances which have been shown here is itself sufficient evidence that the stage plank was weak and not sufficient for the purpose for which it had been intended. If you find that the ship furnished such equipment then your verdict must be in favor of the Haenn Corporation.

10. Before you may find against Haenn you must be satisfied by a fair preponderance of the evidence that Haenn or its employees other than Baccile were careless or negligent and that this carelessness or negligence caused or was a substantial contributing factor to the accident. The law defines legal cause as some breach of duty which is a substantial factor as well as an actual factor in bringing about injury. In this connection it is not enough that the accident would not have occurred had there not been negligence. That in itself is not sufficient.

In order to warrant a finding that negligence is the proximate cause of an injury it must be shown that the injury was the natural and probable consequence of the negligence or wrongful act and that substantial harm should have been foreseen before the accident in the light of the attending circumstances.

11. The uncontradicted evidence in this case is that the Captain of the Vessel, Kuipers, knew that the grain feeders had been damaged during unloading of the ship at Rotterdam. There is no evidence that anyone on behalf of the ship warned or notified the Haenn Company or any of its employees of this fact and the only evidence before you is that the Haenn Company was instructed by Captain Campbell acting on behalf of the ship, to repair the torn burlap in the No. 2 feeder. There is a duty to warn a person who comes upon a vessel of a danger which is known to the shipowner or the Officers of the ship and unless you find as a fact that the Haenn Company knew that there had been damage to the No. 2 feeder aside from the tearing of the burlap, your verdict must be for the Defendant, Haenn.

12. In this action the Defendant, Halcyon, has the burden of proof and it must prove by a fair preponderance of the evidence that the Haenn Company was negligent so as to have caused or substantially contributed to the accident. If the evidence does not satisfy you or if you find that the evidence is evenly balanced, then your verdict must be for Haenn.")

(The jury returned at 5:30 P. M.)

THE CLERK: Members of the jury, please rise.

(The jury rose.)

THE CLERK: Members of the jury, have you agreed upon your special verdict by answering the interrogatories which were submitted to you?

THE FOREMAN: Yes.

THE CLERK: May I have them, please.

(A paper was handed to the clerk.)

THE CLERK: Members of the jury, what is your answer to interrogatory number 1, which reads as follows:

"Were the employees of Haenn Ship Ceiling and Refitting Corporation negligent so that they caused or substantially contributed to the injuries sustained by the Plaintiff Baccile?"

What is your answer to that interrogatory?

THE FOREMAN: Yes.

THE CLERK: What is your answer to interrogatory number 2:

"If your answer to Interrogatory No. 1 is yes, then state the percentage by which the Original Defendant Halcyon and the Third Party Defendant Haenn were negligent so as to contribute to the injuries suffered by the plaintiff."

What is your answer to that interrogatory as it relates to Haenn Ship Ceiling and Refitting Corporation?

THE FOREMAN: Seventy-five per cent.

THE CLERK: What is your answer to that interrogatory as it relates to those in charge of the S. S. "Stad Vlaardingen"?

THE FOREMAN: Twenty-five per cent.

THE CLERK: Members of the jury, hearken to your special verdict as the Court has recorded it in the issue joined wherein Halcyon Lines and Vinke Company are third party plaintiffs and the Haenn Ship Ceiling and Refitting Corporation is third party defendant, you say your answer to interrogatory number 1 is yes, and that your answer to interrogatory number 2, as relates to Haenn Ship Ceiling and Refitting Corporation is seventy-five per

cent, and as it relates to those in charge of the S. S. "Stad Vlaardingen" is twenty-five per cent, and so say you all.

THE JURY: Yes.

THE COURT: Any questions, gentlemen?

(No response.)

THE COURT: The verdict should be recorded.

MR. MOUNT: If the Court please, I move that Your Honor direct the jury to bring in a verdict in favor of the third party plaintiffs and against the third party defendant in the amount of seventy-five per cent of $65,000, which I figure to be $48,750.

THE COURT: I will not do that, Mr. Mount, but I will direct that the special findings of the jury be entered as found by them, and that verdict, members of the jury, is seventy-five per cent of the liability to be imposed against the Haenn Ship Ceiling and Refitting Corporation and twenty-five per cent against the ship owners. That is your verdict. So that for the purposes of amount we may take care of that later.

The jury has not had any official knowledge as to amount, so I should think unless we have some very serious objection to that, I would prefer to handle it that way.

MR. MOUNT: I wish to make of record the amount and ask that the Court either direct the jury or the Court itself mold the verdict.

THE COURT: I think we can do that.

MR. MOUNT: I think that probably can be done otherwise.

THE COURT: I think we can do it. The question is that we understand the jury and that they understand what their verdict is, and that was abundantly clear.

MR. MOUNT: All right, sir.

THE COURT: Thank you, members of the jury.

OPINION.

April 3, 1950

McGRANERY, *J.*

This is an action brought by Salvadore Baccile, an employee of the Haenn Ship Ceiling and Refitting Corporation (Haenn), against Halcyon Lines and Vinke and Company (Halcyon), the owners and operators of the vessel "Stad Vlaardingen". On November 25, 1946, while the vessel was moored at Girard Point, Philadelphia, Haenn was engaged by Halcyon to perform certain work aboard her, including the work of making the ship's grain feeders "grain tight". The grain feeders had been installed by a stevedoring company in Montreal, Canada, and a subsequent journey with a cargo of grain had resulted in some damage to the fittings. Within the number 2 feeder there was a stage planking, about 10 inches wide, supported on cleats nailed to opposite bulkheads of the feeder, at a height of about 30 feet above the bottom of the hold. It appeared from the evidence that this planking had been built and left by the stevedoring company which had installed the feeders. The plaintiff Baccile, one of the carpenters Haenn had sent to work on the ship, and his foreman proceeded to the number 2 feeder with a ladder, part of Haenn's equipment, and lowered it onto the planking. They tapped the planking with the bottom rung of the ladder, in an effort to "sound" for cracks and test for sturdiness. Baccile then climbed down the ladder to the staging, the ladder meanwhile resting on the plank, unsecured at the top except for the foreman's hold on it. After maneuvering himself behind the ladder on the planking, in a situation of precarious balance, and advancing toward the corner of the feeder where the loose burlap lining needed tightening, Baccile felt the staging give. Before he could make any effective move for his safety, the structure collapsed, precipitating him to the bottom of the hold and causing him serious and permanent injuries.

The defendants, after the commencement of the suit, impleaded Haenn. Before trial it was agreed by all parties that a judgment be entered in favor of Baccile against Halcyon, the original defendants, with the understanding that this judgment would not be appealable and that it would be paid in full settlement; the issue should then proceed to trial for a determination of liability between Halcyon, the third-party plaintiff, and Haenn, the third-party defendant.

In submitting the issue to the jury the Court instructed that Halcyon had a duty to provide a reasonably safe place for Haenn's employees to work, and that Haenn had a duty to perform the work in a reasonably safe manner. In order to assist the jury in their deliberations, the Court submitted interrogatories for them to answer. In answering the interrogatories, the jury found that both parties had been negligent, contributing to the injuries suffered by the plaintiff, and apportioned the negligence between the parties in the ratio of 75% to Haenn and 25% to Halcyon.

Haenn, the third-party defendant, now moves for a judgment notwithstanding the verdict, for a new trial, and, in the event of the denial of both, for a molding of the verdict so that the third-party plaintiff may recover from the third-party defendant only 50% of the judgment entered in favor of the original defendant.

In support of its motion for a judgment notwithstanding the verdict, the third-party defendant takes the position that, as a matter of law, there can be no recovery against it because the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901 et seq., precludes any recovery against the employer beyond the limit of its liability as prescribed by that Act. Inasmuch as Haenn has secured the payment of compensation to Baccile, under Section 4 of the Act, it is, under Section 5, immune from direct recovery against it by the plaintiff. Without undertaking to engage in an extended discussion,

it is my opinion that there is both reason and authority for the proposition that immunity from direct suit furnishes no defense to Halcyon's claim for contribution. Rich v. U. S., 177 F. 2d 688; Portel v. U. S., 85 F. Supp. 458; Coal Operators Gas Co. v. U. S., 76 F. Supp. 681; Christon v. U. S., 8 F. R. D. 327; The S. S. Samovar, 72 F. Supp. 574; Severn v. U. S., 69 F. Supp. 21; Green v. War Shipping Administration, 66 F. Supp. 393; The Tampico, 45 F. Supp. 174; Rederii v. Jarka Corp., 26 F. Supp. 304; see also, American Stevedores v. Porello, 330 U. S. 446, 458; Barbarino v. Stanhope S. S. Co., 151 F. 2d 553, 555; Cataldo v. A/S Glittore, 41 F. Supp. 555, 557.

Haenn argues that there may be no right of contribution against it because it was not a joint tort feasor with Halcyon, in that it had no liability to Baccile in common with Halcyon, nor were the parties *in pari delicto*. Concededly, in view of Section 5 of the Compensation Act, Haenn was in no way liable directly to Baccile; but, by virtue of its negligence in contributing to the cause of Baccile's injury, it thereby breached a duty, which it owed to the ship-owner Halcyon, of performing the work on the ship with due care. For the breach of this duty, Haenn is liable to Halcyon. Even though, technically, the satisfaction of this liability might not be the contribution of a joint tort feasor, Haenn must contribute to Halcyon a share of the total damages due Baccile from Halcyon, which damages resulted from the negligent conduct of both defendants. The right to contribution between wrongdoers here does not stand on subrogation, but arises directly from the tort. See The Tampico, supra, page 175.

Haenn also asks for a verdict to be directed in its favor on the ground that there was no disputed issue of fact to be submitted to the jury. Apparently the third-party defendant assumes that the only negligence which could have been found by the jury was based upon Haenn's failure to make an inspection of the condition of the cleats supporting the plank. Because there was no evidence that

such an inspection would have disclosed a defect, it is urged that there was no duty to inspect. See Bruszewski v. Isthmian S. S. Co., 163 F. 2d 720. However, the record discloses other evidence from which the jury might properly have found that Haenn did not perform the work in a reasonably safe manner, under the Court's instruction, by undertaking to do the work in the manner in which it did, at a height of some thirty feet above the bottom of the vessel. Particularly pertinent in this connection is the testimony of the master of the vessel as to how, in his expert opinion, the work should have been performed, by the use of a Jacob's ladder or lashed hatch boards; the testimony of the boatswain Westerhoff that he performed a similar operation (cleaning the grain feeder) by lowering himself into the feeder with a rope ladder and using a hatch cover to stand on; and the testimony of the Chief Surveyor for the Board of Underwriters of New York and Philadelphia that the stage planking served no useful purpose in connection with the grain feeder, but was merely put in for the convenience of the grain fitter in erecting the fittings.

In urging a new trial, the third-party defendant cites as error the refusal of the Court to charge the jury that "The fact that the stage plank gave way under the circumstances which have been shown here is itself sufficient evidence that the stage plank was weak and not sufficient for the purpose for which it had been intended. If you find that the ship furnished such equipment then your verdict must be in favor of the Haenn Corporation." It is contended that the Court erred in denying this instruction under the "seaworthiness" doctrine of the Sieracki case, supra. However, assuming that the "seaworthiness" doctrine of that case extends to a carpenter employed by an independent contractor, the mere fact that the plank gave way is not sufficient evidence that the plank was defective. It is a permissible inference that the plank gave way because it was used in a manner in which it was not intended to be used. Consequently the refusal of the charge was

not an erroneous application of the doctrine of seaworthiness.

With respect to the molding of the verdict, Haenn moves the Court to provide that Halcyon may obtain recovery only to the extent of 50% of the judgment which has been entered against Halcyon in favor of Baccile, notwithstanding the fact that the jury determined Haenn to have been 75% responsible. Although the Court did require the jury's determination of comparative negligence, upon further reflection, I have come to the conclusion that it is the duty of the Court to mold the verdict in accord with the principles of contribution between joint tort feasors under the maritime law. There is no doubt that the suit concerns a maritime tort, and that principles of admiralty law should govern. Seas Shipping Co. v. Sieracki, 328 U. S. 85, 88; Garrett v. Moore-McCormack, 317 U. S. 239; Apica v. Penn. Warehousing & Safe Deposit Co., 74 F. Supp. 819. Except for the operation of the Longshoremen's and Harbor Workers' Act, Haenn and Halcyon are joint tort feasors. The usual rule in admiralty, in the absence of contract, is equal contribution between joint tort feasors. American Stevedores v. Porello, 330 U. S. 446, 458. Conceding that "comparative negligence is not unknown to our maritime law", ibid., and recognizing that the Court could exercise its "conscientious discretion to give or withhold damages upon enlarged principles of justice and equity," The Explorer, 20 Fed. 135, 139; see also, Coal Operators Gas Co. v. U. S., 76 F. Supp. 681, 683; Portel v. U. S., supra; Guerrini v. U. S., 167 F. 2d 352; nevertheless, I am constrained, in the circumstances of this case, to abide by the general admiralty rule of equal contribution.

Accordingly, an order will be entered denying the motions for judgment notwithstanding the verdict and for a new trial, and directing that judgment be entered in favor of the third-party plaintiff against the third-party defendant for 50% of the judgment entered against the third-party plaintiff in favor of the original plaintiff.

ORDER.

AND NOW this 3rd day of April, 1950, in the above-entitled case, it is ORDERED that the third-party defendant's motions for judgment notwithstanding the verdict and for a new trial, be and hereby are

DENIED;

AND IT IS FURTHER ORDERED that a judgment be entered in favor of the third-party plaintiff against the third-party defendant in the amount of Thirty-two Thousand and Five Hundred Dollars ($32,500.00).

(s) McGRANERY, *J.*

Appendix.

RELEVANT DOCKET ENTRIES.

Oct. 7, 1947.	Complaint filed.
Oct. 7, 1947.	Summons exit.
Oct. 7, 1947.	Plaintiff's demand for Jury Trial filed.
Oct. 17, 1947.	Summons returned "On October 13, 1947 served" and filed.
Oct. 30, 1947.	Appearance of Rawle & Henderson, Esq. for defendant filed.
Dec. 5, 1947.	Answer filed.
Dec. 17, 1947.	Plaintiff's interrogatories to defendant filed.
Feb. 26, 1948.	Defendant's answer to Interrogatories, filed.
Mar. 4, 1948.	Defendant's notice of taking deposition of S. Baccile, filed.
Mar. 12, 1948.	Order to place case on the Trial List filed.
Mar. 15, 1948.	Motion by plaintiff for production of documents etc. and Order of Court granting motion filed. 3/16/48 Noted and Notice mailed.
Apr. 21, 1948.	Motion to join Third-party defendant and Order of Court granting motion filed. 4/22/48 Noted and notice mailed.
Apr. 21, 1948.	Third-party complaint filed.
Apr. 21, 1948.	Third-party Summons exit.
May 14, 1948.	Summons returned "and served on April 28, 1948" and filed.
May 17, 1948.	Appearance of Krusen, Evans & Shaw, Esqs., for third-party defendant, filed.

June 7, 1948. Answer of Haenn Ship Ceiling and Refitting Corp., filed.

June 8, 1948. Stipulation of Counsel amending third-party complaint filed.

Nov. 21, 1949. Jury called and sworn. Alternate jurors sworn.

Nov. 21, 1949. In open Court: Parties stipulate that judgment be entered in favor of plaintiff and against defendants in sum of $65,000. and that trial proceed on the issue between original defendants and 3rd party defendant.

Nov. 21, 1949. Judgment in favor of plaintiff in sum of $65,000 and against Halcyon Lines, Vinke and Company, filed 11/22/49 Noted and notice mailed.

Nov. 21, 1949. Trial on 3rd party complaint. Witness sworn.

Nov. 22, 1949. Trial resumed.

Nov. 28, 1949. Trial resumed.

Nov. 28, 1949. Verdict: The jury renders a special verdict and answers certain interrogatories (see minutes).

Dec. 1, 1949. Hearing on motion for judgment on the verdict.

Dec. 8, 1949. Motion by 3rd party defendant for judgment n. o. v.; for a new trial; and for molding the verdict filed.

Dec. 20, 1949. Testimony filed. (1 vol.)

Dec. 20, 1949. Third-party plaintiff's request for charge filed.

Dec. 20, 1949. Third-party defendant's points for charge filed.

Jan. 5, 1950.	Order to mark judgment in favor of plaintiff and against Halcyon Lines, Vinke & Co., satisfied, filed.
Jan. 5, 1950.	In accordance with order filed judgment in favor of plaintiff is marked satisfied. Attest: Gilbert W. Ludwig Deputy Clerk.
Feb. 8, 1950.	Hearing sur motion of Halcyon Lines for judgment n. o. v.; for a new trial; and for the molding of the verdict. c. a. v.
Apr. 3, 1950.	Opinion, McGranery, J., sur motion of 3rd party defendant for judgment n. o. v. or for a new trial and directing entry of judgment filed.
Apr. 3, 1950.	Order of Court denying 3rd party defendant's motion for judgment n. o. v. and for a new trial and directing entry of judgment filed. 4/4/50 noted and notice given.
Apr. 3, 1950.	Judgment in favor of 3rd party plaintiffs and against 3rd party defendant in sum of $32,500, filed. 4/4/50 Noted and notice mailed.
May 2, 1950.	Notice of Appeal by Halcyon Lines and Vinke & Co., defendants, filed. 5/3/50 Copy to Krusen, Evans & Shaw, Esqs.
May 2, 1950.	Copy of Clerk's Notice to U. S. Court of Appeals, filed.

COMPLAINT.

Plaintiff, SALVADORE BACCILE, claims of the above named defendants the sum of Two Hundred Thousand ($200,000.00) Dollars with lawful interest thereon, upon a cause of action whereof the following is a true statement:

1. Plaintiff is a resident of the City of Philadelphia and a citizen of the Commonwealth of Pennsylvania.

2. Defendants, HALCYON LINES (HALCYON LIJN) and VINKE AND COMPANY, are foreign corporations existing under and by virtue of the laws of The Netherlands.

3. At all times mentioned herein, plaintiff was in the employ of HAENN SHIP CEILING AND REFITTING COMPANY, in the capacity of longshoreman.

4. Upon information and belief, plaintiff avers that at all times mentioned herein defendants owned, operated and controlled the vessel "Stad Vlaardingen" in foreign commerce.

5. At all times hereinafter mentioned, the Haenn Ship Ceiling and Refitting Company was engaged and authorized to perform work aboard said vessel.

6. On or about the 25th day of November, 1946, plaintiff, in company with other longshoremen, was assigned to work aboard the "Stad Vlaardingen", which was then in navigable waters of the United States and was moored to Girard Point dock in the City of Philadelphia, Pennsylvania.

7. On or about the 25th day of November, 1946, at or about 4:30 P. M., plaintiff, in the course of his employment, was working in the feeder in the number two hatch when the floor plank upon which he was working gave way, precipitating him into the hold below and causing the injuries hereinafter more specifically set forth.

8. Disregarding their duties in the premises, defendants, by their agents, servants, workmen and employees, were negligent and the vessel was unseaworthy in the following respects:

(a) failing to provide a reasonable and safe place for plaintiff to perform his duties;

(b) failing to provide proper and adequate equipment for the safe performance of work;

(c) failing to provide a safe and adequate floor planking and other safety devices for the proper performance of the work;

(d) providing a dangerous and unseaworthy floor plank under the circumstances;

(e) allowing said floor plank to become loosened, insecure and otherwise unsafe;

(f) failing to adequately inspect the said floor plank to determine the existence of any unsafe conditions;

(g) failing to provide plaintiff with a safe and seaworthy vessel and safe appurtenances and to keep same in a seaworthy condition;

(h) permitting plaintiff to work on the vessel without warning him of the unsafe and dangerous condition;

(i) otherwise failing to use due care under the circumstances.

9. Solely by reason of the negligence of defendants and unseaworthiness of the vessel, plaintiff fell as aforesaid; he suffered a severe shock and injury to his nervous system; he suffered multiple contusions, bruises, sprains and strains over his entire body, multiple comminuted and displaced fractures and demineralization of the bones of his spinal column, pelvis, legs and feet, paralysis of his lower trunk and lower extremities and loss of vital body functions; he

suffered a comminuted fracture of the first lumbar vertebra, narrowing of the apophyseal joints and impingement of the spinal cord with narrowing of the intervertebral spaces; he suffered a comminuted displaced fracture of the lower one-third of the right tibia, with one and one-quarter inches shortening, fractures of the internal, external and posterior malleoli of the right tibia, derangement of the joint space and decalcification of the lower right tibia; he suffered comminuted fracture of the right ankle, fracture of the oscalcis of the right foot, demineralization of all the bones of the right ankle, and foot, distortion of the mortise of the right ankle and traumatic arthritis of the right ankle and subastragalar joint; he suffered comminuted fracture of the cuboid and scaphoid bones of the left foot, comminuted fracture of the oscalcis of the left foot with free fragments in the soft tissue, a comminuted fracture of the left external and medial malleoli, general demineralization of all bones of the left foot and traumatic arthritis of the left subastragalar joint; he suffered kyphosis of the spine, right gluteo-femoral ulcer, pressure neurosis and trophic ulcer of the right heel and injury to the cauda equina; he suffered a lesion to the conus medullaris, injury to the sacral nerve fibers, paralysis of the lower rectum, and sphincter and bladder, analgesia and anaesthesia of the perineum, scrotum, penis and soles of the feet and urinary and bowel retention; he has required constant catheterization; he has suffered paralysis of urinary function and urinary continence and has had to wear a rubber bladder; he has suffered lack of urinary and bowel control and sensation; he has suffered hemorrhoids; he has suffered lack of sexual sensation, loss of sexual power and sexual impotence; his back and spine and all the surrounding musculature were fractured, sprained and otherwise injured; his nervous and nervous system have been seriously impaired; he has suffered excruciating and agonizing aches, pains, mental anguish, shock and ability; he has had to undergo numerous surgical operations; he has had to wear a body cast and

leg and foot cast; he has had to wear a body brace; he has been unable to assume his usual duties and occupation for a long period of time in the past and upon information believes and, therefore, avers that his injuries have become permanent, and that he will have to undergo numerous surgical operations and that he will be permanently disabled from performing his usual duties and occupation in the future; he has in the past been and will in the future be compelled to expend large sums of money for medicine, medical care, surgery and treatment.

WHEREFORE, SALVADORE BACCILE claims the sum of Two Hundred Thousand ($200,000.00) Dollars and brings this action to recover same from defendants.

FREEDMAN, LANDY AND LORRY,
By
/s/ MARTIN J. VIGDERMAN,
Attorneys fo. Plaintiff.

ANSWER TO COMPLAINT.

The answer of HALCYON LINES (HALCYON LIJN) and VINKE AND COMPANY, defendants, by their attorneys, to the complaint of SALVADORE BACCILE, plaintiff, respectfully shows to this Honorable Court upon information and belief as follows:

FIRST DEFENSE.

Defendants admit the allegations contained in paragraphs 1, 2, 4, and 5 of the complaint; admit that on or about the 25th day of November, 1946, the "Stad Vlaardingen" was in navigable waters of the United States and was moored to Girard Point dock, Philadelphia, Pennsylvania, as alleged in paragraph 6, but defendants are without knowledge or means of information sufficient to determine whether plaintiff was in the employ of Haenn Ship Ceiling and Refitting Company or had been assigned to work aboard said vessel on that date as alleged in paragraphs 3 and 6, and they deny that plaintiff was a longshoreman at such time, as alleged in the said paragraphs; defendants are without knowledge or means of information sufficient to determine the truth of the allegations contained in paragraphs 7 and 9, and the same are accordingly denied and strict proof thereof is demanded; and each and every other allegation of the complaint is hereby specifically denied.

Further answering, defendants deny that they, or their agents, servants, workmen and employees were negligent, or that the vessel was unseaworthy, as alleged in paragraph 8 of the complaint. On the contrary they aver that they provided a customary, reasonable safe and proper place for plaintiff to perform his duties; that they provided usual, proper and adequate equipment for the safe performance of work; that they provided normal, customary, safe and adequate floor planking and all necessary and customary safety devices for the proper performance of the work; that

to the best of their knowledge, information and belief there was no dangerous or unseaworthy floor plank in the feeder in the number two hatch at any material time, and that all such planks were maintained in a safe, customary and proper condition and were not allowed to become loosened, insecure or otherwise unsafe; that such planks were duly and adequately inspected to determine the existence of any unsafe condition; that they provided and maintained a safe and seaworthy vessel, being properly manned, equipped and supplied at all material times; and that defendants have no knowledge of any unsafe or dangerous condition existing on board the said vessel at any material time of which warning should or could have been given to plaintiff, and they hereby specifically deny that any such condition existed.

SECOND DEFENSE.

As a further and separate defense, defendants aver upon information and belief that plaintiff voluntarily assumed the risks of his employment as a ship fitter and carpenter, and that his alleged injury was due to the normal and expected hazards of his occupation and the duties which he was engaged in performing at the time of the alleged accident.

THIRD DEFENSE.

As a further and separate defense, defendants aver upon information and belief that the alleged accident was due at least in part to the negligence of plaintiff in failing to exercise due, proper and reasonable care in the performance of his duties, particularly in respect to the following:

(a) By failing to observe the alleged unsafe condition of the plank;

(b) By failing to test the said plank in order to determine its alleged defective condition before using the same;

(c) By failing to provide or require sufficient light to make reasonable and adequate examination of the said plank in order to determine its alleged defective condition;

(d) By placing an unusual and excessive strain on said planking, and

(e) In other respects to be shown at the trial.

RAWLE & HENDERSON,

By /s/ JOSEPH W. HENDERSON,
Attorneys for Defendants,
1910 Packard Building,
Philadelphia, Pennsylvania.

THIRD-PARTY COMPLAINT.

1. Plaintiff Salvadore Baccile has filed against defendants Halcyon Lines (Halcyon Lijn), Vinke and Company a complaint, a copy of which is hereto attached and marked Exhibit I.

2. Defendants and Third-Party Plaintiffs are foreign corporations duly organized and existing under and by virtue of the laws of the Netherlands, and third-party defendant Haenn Ship Ceiling and Refitting Corporation is stated upon information and belief to be a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania. In addition to diversity of citizenship between the said third-parties plaintiff and defendant, the amount in controversy exceeds the sum of $2,500.00.

3. At all times material to these proceedings, third-party defendant HAENN SHIP CEILING AND REFITTING CORPORATION was engaged in business at Schuylkill Avenue below Magazine Lane, Philadelphia, Penna., and was engaged inter alia in the business of constructing and repairing grain fittings on seagoing vessels.

4. On or about November 25, 1946, third-party defendant, at the request of third-party plaintiffs their agents and representatives, undertook to repair certain grain fittings on Steamship STAD VLAARDINGEN, which vessel was owned and operated by third-party plaintiffs, and was located at Girard Point pier, Schuylkill River, Philadelphia, Penna.

5. Third-party defendant was in full charge and control of the manner and means conducting the aforesaid repairs to the grain fittings on Steamship STAD VLAARDINGEN, and through its agents, servants and employees took possession of the necessary holds where the said repairs were to be made by 1:30 P. M. on November 25, 1946 and placed its own employees in the said holds to conduct the work, and supplied its own lumber and materials in and about the said operation.

6. According to the Complaint filed herein, being Exhibit I annexed to the present petition, plaintiff was a workman employed by third-party defendant on the said repair operation, and it was alleged that the plaintiff was injured about 4:30 P. M. on November 25, 1946, in the course of his employment by third-party defendant while working in the grain feeder in the No. 2 hatch when the floor plank upon which he was working gave way precipitating him into the hold below, and causing the injuries for which the suit was brought. Defendants and third-party plaintiffs have filed an answer to the said Complaint denying liability to the plaintiff for the said injuries, a true and correct copy of which answer is annexed hereto and made a part hereof and marked Exhibit II.

7. Third-party plaintiffs aver that the aforesaid accident and occurrence was not due to any negligence on the part of the said third-party defendants, their agents, servants or employees or to any unseaworthiness of the vessel or negligence on the part of any persons in charge of the said vessel, but aver that the said accident and occurrence was due solely or in major part to the negligence and carelessness of the third-party defendant, its agents, servants and employees, alone or in combination with the contributory negligence of the plaintiff, in the following respects, to wit:

a. the work was in charge of incompetent persons;

b. the foreman and other employees of third-party defendant failed to take reasonable and proper precautions in the construction and use of the staging upon which plaintiff was working at the time of the said accident;

c. the foreman and other employees of the third-party defendant in charge and control of the work failed and neglected to make necessary and adequate inspections of the staging which is alleged to have caused the accident;

d. the said staging was weakened prior to its use by the plaintiff through the negligent acts of the employees of the third-party defendant.

e. the said staging was subjected by the employees of the third-party defendant to an unusual and excessive strain under the circumstances;

f. the employees of the third-party defendant failed and neglected to provide the necessary safeguards to prevent plaintiff from falling into the hold if the staging failed to support him.

g. the employees of the third-party defendant failed to take reasonable and necessary means to provide for the plaintiff's reasonable safety under the circumstances;

h. in other respects to be shown at the trial.

8. By reason of the aforesaid fault and negligence of the third-party defendant, its agents, servants and employees, the same is liable over by way of indemnity to defendants and third-party plaintiffs for any and all sums which defendants and third-party plaintiffs may be found at the trial to be liable to the plaintiff in the present action between plaintiff and defendants.

WHEREFORE, defendants HALCYON LINES (HALCYON LIJN), VINKE AND COMPANY demand judgment against third-party defendant HAENN SHIP CEILING AND REFITTING CORPORATION for all sums that may be adjudged against the aforesaid defendants in suit of the plaintiff herein.

RAWLE & HENDERSON,

By JOSEPH W. HENDERSON,
Attorneys for Halcyon Lines (Halcyon Lijn), Vinke and Company,
1910 Packard Building,
Philadelphia, Pa.

STIPULATION OF COUNSEL.

AND NOW, to wit, this day of May, 1948, it is stipulated and agreed by and between Rawle & Henderson, attorneys for third-party plaintiffs, and Krusen, Evans & Shaw, attorneys for third-party defendant, that the third-party complaint filed in these proceedings may be, and the same is hereby amended to read as follows, with the same force and effect as though originally set forth in the said complaint beginning at Paragraph 8 thereof, to wit:

"8. By reason of the aforesaid fault and negligence of the third-party defendant, its agents, servants and employees, said third-party defendant is jointly liable with third-party plaintiff for, and should be required to contribute to the payment of, any and all damages adjudged to the plaintiff in these proceedings.

"WHEREFORE, defendants and third-party plaintiffs HALCYON LINES (HALCYON LIJN) and VINKE AND COMPANY demand contribution from third-party defendant HAENN SHIP CEILING AND REFITTING CORPORATION, in the event that the said parties are found to be jointly negligent in the premises, the existence of such negligence on the part of the said defendants and third-party plaintiffs being hereby expressly denied."

RAWLE & HENDERSON,

By /s/ JOSEPH W. HENDERSON,
Attorneys for Defendant and Third-Party Plaintiffs.

KRUSEN, EVANS & SHAW,
By /s/ T. E. BYRNE, JR.,
Attorneys for Third-Party Defendant.

ANSWER.

The Answer of Haenn Ship Ceiling and Refitting Corporation, Third-Party Defendant, to the Third-Party Complaint of Halcyon Lines (Halcyon Lijn) and Vinke and Company, as amended by the stipulation of counsel, respectfully alleges, upon information and belief, as follows:

1. Admitted. The Third-Party Defendant admits that the Plaintiff has filed a suit against the Original Defendant.

2. The Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, admits the averments of the second paragraph of the Complaint but it denies that there is diversity of citizenship between the Plaintiff and the Third-Party Defendant.

3. Admitted.

4. Admitted.

5. The Third-Party Defendant denies the averments of the fifth paragraph of the Complaint as stated. It admits that it supplied lumber and material in connection with the repair of certain fittings on board the Steamship "Stad Vlaardingen" and that its servants, workmen and employees were to perform the said work on board the said vessel. It denies the remaining averments of the fifth paragraph of the Complaint and demands proof thereof.

6. The Third-Party Defendant admits that the Plaintiff, Salvadore Baccile, was a workman employed by it in connection with the repairs to be made on board the Steamship "Stad Vlaardingen". It admits that the Complaint filed on behalf of the said Salvadore Baccile alleges that the Plaintiff was injured at or about 4:30 P. M. on November 25th, 1946 in the course of his employment while working in the grain feeder of the #2 hatch when a floor plank upon which he was working gave way precipitating him into the hold below and causing injuries for which the suit of the said Salvadore Baccile has been brought against the

Original Defendant. The Third-Party Defendant further admits that the Original Defendant and Third-Party Plaintiff has filed an Answer to the Complaint of Salvadore Baccile in which the Defendant and Third-Party Plaintiff denies liability to the Plaintiff for his injuries. The Third-Party Defendant further admits that Exhibit #1 is a true and correct copy of the Complaint filed on behalf of the said Salvadore Baccile and that Exhibit #2 is a true and correct copy of the Answer to the Complaint filed on behalf of the Original Defendants and Third-Party Plaintiffs.

7. Denied. The Third-Party Defendant denies the averments of the Third-Party Complaint including the subsections lettered "a" to "h" inclusive.

8. Denied. The Third-Party Defendant denies the averments of the eighth paragraph of the Complaint, both the averments as originally filed and as amended by stipulation of counsel.

SECOND DEFENSE.

The Plaintiff herein, Salvadore Baccile, at the time and place referred to in the Complaint and Third-Party Complaint, was an employee of the Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation. His said injury occurred during the course of his employment upon the navigable waters of the United States and under circumstances where recovery for his disability against the Third-Party Defendant may not validly be provided by State Law. The Third-Party Defendant accordingly avers that as between itself and the Plaintiff, Salvadore Baccile, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, were applicable and that § 5 of the said Act provides in part that the liability of an employer shall be exclusive and in place of all other liability of such employer to the Plaintiff or anyone otherwise entitled to recover damages from the said Third-Party Defendant, at law or in Admiralty on account of such injury. The Third-Party Defendant further avers that it has

secured the payment of the compensation provided for in the said Act to the Plaintiff and that the said compensation has been paid according to law. The Third-Party Defendant therefore pleads the provisions of § 5 of the Longshoremen's and Harbor Workers' Compensation Act as a bar to the within action.

THIRD DEFENSE.

If the Plaintiff was injured as the result of negligence, which the Third-Party Defendant denies, then his injuries were the result of the negligence of the Plaintiff or of other persons for whose actions the Third-Party Defendant would not be responsible. The Third-Party Defendant denies that the Plaintiff sustained injuries through any negligence of the Third-Party Defendant or any persons for whose acts of omission or commission the Third-Party Defendant would be responsible to the Third-Party Plaintiff.

WHEREFORE, the Third-Party Defendant prays that the Third-Party Complaint shall be dismissed, that it may recover its costs in this proceeding and that it shall have such other and further relief as may seem just to this Honorable Court in the premises.

KRUSEN, EVANS AND SHAW,

By /s/ THOMAS E. BYRNE, JR.,
Attorneys for Third-Party Defendant.

CHARGE OF THE COURT.

McGRANERY, *J.*

Members of the jury, without resort to prophecy, it looks as though we have come to the end of this case. The presentation of the evidence and the summing up of that evidence for your benefit ends it so far as the litigants themselves are concerned. It now reaches a point where the Court and the jury will begin their respective tasks. I shall discuss very little of the evidence. I do not propose to go into it at any length, because the actual evidence is strictly your province.

However, in order to orient your minds properly so that it will be before you in one, two, three, order, this is an action brought by Salvadore Baccile against the Halcyon Lines, Vinke and Company, who you will understand are the owners of the ship. Having been sued by Mr. Baccile, they in effect say: "We are not responsible," or, at least, "We are not solely responsible. This accident happened as a result of the negligence of Haenn Ship Ceiling and Refitting Corporation who were the employers of Mr. Baccile."

As you may know, under the law, if Mr. Baccile were injured in the regular course of his employment as a result of the negligence of his employer, he, of course, would be relegated to a remedy under the compensation law, but here, Mr. Baccile elected, as he had a right to do under the law, to sue Halcyon Lines, Vinke and Company, who, in effect, say: "No; we made a contract with the Haenn Ship Ceiling and Refitting Corporation and the injury resulted from the negligence of Haenn Ship Ceiling and Refitting Corporation, and although we owed him the duty of providing him a safe place in which to work, the Haenn Corporation owed us, the shipping line, the duty of performing that work in a safe manner."

You see, therefore, although there has been an agreement concerning the money to be paid Mr. Baccile, the shipping line says: "Under our contract we have a right to sub-

mit to the jury the question of whether or not we were solely responsible, whether or not the Haenn Corporation was solely responsible, or in what percentage the responsibility may be divided. A little later I will touch directly on that point.

In order to have an overall picture, you will keep that in mind as the beginning of the action, the point from which we start. That is the basis of it. They have a right to determine that issue in this Court under federal law because the Halcyon Lines use our ports. While it is a foreign vessel, it has every standing before you that a citizen would have; it has every right to expect from you a just verdict.

Having in mind the parties to the action, we may move then to a consideration of how you as jurors act. What causes you to act? What will you give consideration to?

Of course, in all of this, you will act in accordance with the solemn oath or affirmation which you took at the outset to well and truly try this case and to render a just verdict under the evidence as it may come from the witness stand the law as I give it to you.

First, as jurors, you are the sole judges of the facts.

This action is based upon negligence. Negligence is the basis of the action; not the mere happening of an accident. Some times there are what people call "pure accidents." They happen. They happen, and only God knows why. No one is entitled to compensation—not in this life at least—under those circumstances.

The burden is upon the person attempting to show the negligence. In this case, the third party plaintiff, the Halcyon Lines, has the burden of proving to you by a preponderance of the evidence the negligence of the Haenn Ship Ceiling and Refitting Corporation. If they can not prove that by a preponderance of the evidence, then, of course, there would be a verdict in favor of the third party defendant, and that would be the end of the case.

You will consider the evidence as it came from the stand, and of that you are the sole judges. If I make ref-

erence, during the course of my charge, to the evidence, and your recollection is at variance with mine, you will quickly disregard what I say with regard to it and rely upon that which you firmly believe it to be, because its effect is upon your conscience and not upon mine.

While you are the sole judges of the evidence you will, however, take the law from the Court no matter how unfairly you seem to think that I might state it to you, and you will apply that law to the facts as you have heard them in arriving at a just and proper verdict.

You will likewise be the sole judges of the credibility of the witnesses. What do we mean by "credibility of witnesses?" What is the standard that you as jurors will apply as a test of one's credibility? It is pretty much as though, members of the jury, a man walked into your home or into your office and sat down and related a proposition to you which was a very serious matter: How would you treat it? How would you regard the story that he gave to you? What are his qualifications to relate the story to you? What is his ability, as it were, to know exactly what happened? What position did he occupy? In what manner does he relate it to you? Does he appear to be absolutely forthright in trying to give you the whole truth as he saw it happen?

Sometimes people do not intentionally mean to perjure themselves or to lie, but we record things differently.

Incidentally, I might say to the thirteenth juror, the supernumerary, that as I finish my charge she will step out and will no more be a part of the jury. There are only twelve to deliberate, and you will not go to the jury room with the jury.

How do they seem to answer? Do they haggle with the questioner? Do they come right out in forthright manner and tell you exactly what happened as the saw it, or as they say they saw it, or do they parry? They are the various tests you will apply.

What interest does a witness have in the outcome of the case? That, too, is important. Would the interest of a particular witness be such as to cause him to tend to color his testimony?

In other words, generally speaking, if somebody walks in and tells you a story, how do you regard it after he is all through? When he walks out do you say in your mind that that fellow is a big wind; that he was in no position to see what he related and that he doesn't know what he is talking about?

On the other hand, would you say that that person has given a very forthright story, that by reason of his intelligence, by reason of his experience and know-how, he is in a position to tell you just exactly what happened? They are the things, the sort of little tests, that you would apply in determining whether or not the credibility of a witness satisfies you. You are the sole judges of that. If you should find that a witness were to lie, and you feel that he did so knowingly or wilfully—and I don't think there is anything like that in this case—you would disregard the whole of his testimony or her testimony.

This case has been very ably presented by counsel on both sides, who have, I think, tried to arrive at a very proper determination of the rights of the parties. I see no indication that there has been any holding back of testimony or any hedging about it. You seem to have the whole case, as I regard it from here, very ably presented by both sides.

It comes down to the question of negligence. Who was at fault? Mr. Baccille is out of it. What is the story with respect to the rights of the various parties under our law? I say to you, and I say it to you as the law and it will be binding upon you, that there was a duty upon the shipowner to provide a safe place for the employees of the Haenn Company to work; but by the same token it was the duty of the Haenn Company to see that the work was performed safely.

You heard the terms of the contract between the ship owners through the man from Lavino and Company, the shipping agent in this port for the Halcyon Line. He testified that he, in turn, at the direction of the captain, ordered Haenn to do certain work, but we will concern ourselves strictly with this number 2 hold or feeder; we are not concerned about the contract beyond the number 2 hold, but only as it relates to the number 2 hold.

What is the picture that the evidence presents? It shows that this particular feeder was erected in Montreal, Canada, that a load of grain was poured into the ship, that it was carried to and discharged from the ship at Rotterdam; that the ship returned in ballast—and you know what that is—something to sort of keep the ship a little steady when she is coming back otherwise empty. Some times they use water; some times they use other things. There is no evidence here as to what they used, but she came back in ballast, and you may infer from the evidence that the hold was empty, because the ship's crew entered number 2 feeder, cleaned it out—swept it out, as it were.

You have the testimony of the captain as it was reported to him by the boatswain, and you also have the deposition of the boatswain which was read to you, to the effect that he, during the crossing, took part of the crew into the feeder, went down there and swept it out; so that the contract between the ship owner, through its agent Lavino and Company, and Haenn Ship Ceiling and Refitting Corporation, was to go aboard the ship and there to meet Captain Campbell. Captain Campbell described himself as the one representing the ship underwriters in charge of the Port of New York, and apparently Philadelpha is considered a part of that port for their purposes. He was aboard the ship. The chief officer and he went around the ship. Captain Campbell said that there had to be other fittings put in there, and in the crossing certain damage had been done to the number 2 feeder so that in some way or other the burlap became loose. The purpose of the burlap

was to keep the feeder grain-tight. The rough boards which they used, not being mailed in, as he described them, or fitted in close, would have a tendency to let grain force its way through the crevices, therefore the burlap came down and prevented just that from happening. In this particular feeder it was to make the burlap fast that the Haenn folks were employed.

You will understand that Captain Campbell and the ship's master both testified that these feeders were no part of the ship's structure, but were to be created only for the purposes of carrying grain cargo and distributing it over the ship in an even manner so as to prevent the ship from tipping over in a rough sea.

It is not clear as to who put the staging or the plank in this number 2 feeder, but it is clear from the evidence of the master and from the evidence of Captain Campbell that it was to be used for the convenience of the men working in that feeder.

When they came aboard the ship, first the general superintendent, Mr. Knopf, I think, walked about the ship with Caiptain Campbell. They discussed the things after the chief officer had discussed them with Captain Campbell, and it then became Captain Campbell's duty to give the instructions, and he gave those instructions to Haenn's general superintendent aboard the ship.

Following that, there was a telephone call made, and the contract required Haenn and Company to furnish the men and material. You will remember that precisely. The ladder that came aboard and the lumber that was to be used were brought aboard the ship by the Haenn Company. Everything was furnished by the Haenn Company except, I think he said, the saws which the men themselves were required to carry, their own employees.

Finally, the evidence shows that the foreman and Mr. Baccile came to the number 2 feeder and they put a ladder down, and they used the ladder with the legs or sides of it astride the staging, and by the bottom rung tapped in the

forward part—or, I believe, the after part here—and then in the middle, to find about the security of it. They didn't know what it was resting on.

Number 1 for your consideration is: When the ship's crew under the direction of the boatswain of the vessel went into the feeder to clean it out, he said there was no staging there. Is he mistaken? Was the staging there? What was the condition of the staging? Obviously he didn't inspect it, because he said it was not there. If under careful examination it certainly could have been ascertained that the staging was there, by looking in—if having seen it there, with this torn burlap in whatever way it was hanging there, both ends of the planking or staging being covered so that what it was resting on was not visible to the eye, was there a duty to look under there and find out? You have got to determine that.

When we come to the Haenn folks, the foreman who made those testings said that he did not believe there was any duty; there was no custom about it; but, members of the jury, we have to act as prudent persons. The law has no regard for foolish persons; we must act prudently under the circumstances. Would a prudent person tap that at one end, and in the middle, with the bottom rung of the ladder, not seeing what it was resting upon, and say, "Go down there and straighten it out"? Or would a prudent person say, "What is at the other end of that?" It is all right about its not having a hollow sound or a cracked sound—what is that resting on, number 1? And is it secure? There is no evidence about that here, yet that is the end that gave way—the cleat, as they call it, which was a strip of planking, a narrow strip of planking, put up there to hold this staging.

Would a reasonably prudent person under those circumstances want to go down and lift up that burlap in some manner other than by placing a ladder on the planking to find out? There is quite a space below after you leave the bottom of that ladder.

Members of the jury, they are questions that you and you alone must determine. You will determine what the relationship was between the ship owners and Mr. Baccile. Were they negligent? Were they entirely at fault? Or did their negligence contribute in any substantial manner to the injury suffered by Mr. Baccile?

Likewise, you will consider under the terms of the original contract between Haenn Company and the ship owners what their relationship was. The laws says that they owe a duty to the ship owner to perform this work in a reasonably safe manner. Did they act reasonably safely under the circumstances? And in all these questions you will regard them as "under the circumstances."

Negligence—you all know what it is. Negligence is the doing of something that a reasonably prudent person would not do under the circumstances, or the failure to do that which a reasonably prudent person would do under the circumstances. That is our law. That is the standard. That is your guide.

This case does not pose any peculiar difficulty. It presents, however, a very serious question for your determination: What are the rights of these two parties? Who was responsible for the occurrence of this accident?

I propose to submit two very simple questions that you might well answer. One of them will be: Did the Haenn Company through the negligence of its foreman or agent substantially contribute to the injury suffered by Mr. Baccile?

If your answer to that is "no", and that this happened solely as the negligence of the shipping company, that would be the end of the case; but if your answer is "yes", the second question that you will answer is: What percentage did the negligence of each contribute to the full accident suffered by Mr. Baccile? Is that fairly clear to you, members of the jury?

Your verdict, of course, will be unanimous. All twelve of you will have to agree on your verdict. And, members

of the jury, I do not think I need remind you that while you have given a great deal of your time, and certainly your very intelligent attention as I have observed you from here, to what has been going on, you will give this your serious consideration because, after all, we are the last place on this globe where two parties can come in and present to a jury of twelve disinterested persons whose interest will be the preservation of our free institutions and the right, if we ourselves find ourselves in the same predicament some day, to have our rights determined.

Therefore in considering this you will have no other consideration in your minds than the evidence that you heard; you will apply to it the law as I gave it to you, and let the chips fall where they may. You can then walk out with your heads high. You will not have to worry about whether you did the right thing or the wrong thing. If you do what your conscience tells you to do under the law as you heard it from the bench and the evidence as you heard it from the witness stand, take the law as I give it to you and apply it to these facts. By so doing, you won't have to worry a bit, and you will make a contribution to this great system that we live under. It is free. That is our only consideration. We are not going to be concerned about whether it is a Dutch line or an Indian line. If it did not have the right to come into our Court it would not be here. Having that right, you and I will preserve that right. That will be our only consideration.

Members of the jury, I have been asked by both sides to charge you, and what I read I will read to you as I believe it to be the law. I will take the third party plaintiffs first. The third party plaintiffs asked me to charge you that there was a duty on the part of the Haenn Ship Ceiling and Refitting Corporation, the employer of the plaintiff, Salvadore Baccile, to make inspection and examination of the parts of the grain fittings which it had undertaken to repair, to furnish competent foremen and other persons to supervise the work, and to perform the work of repairing the grain

fittings in the vessel in a careful and proper manner in order to prevent injury to the plaintiff. That is the law.

The Haenn Ship Ceiling and Refitting Corporation was under a duty to the vessel owners to perform the work of repairing grain fittings in the vessel in a careful and proper manner. That is the law.

The duty which the vessel owner owed to Salvadore Baccile, as a business guest, was to furnish him a reasonably safe place in which to work, and to make inspections and examinations to ascertain the condition of the parts of the ship which he and his employer were engaged in repairing. That is the law.

Where the vessel owner has given over a part of a vessel to an independent contractor engaged to perform work in that part of the vessel, the vessel owner has no duty to supervise or control the manner in which the independent contractor and/or his employees perform the work, with the understanding that we have stated before, that there was a duty, if they knew, to advise the Haenn people—if they knew.

If you find that the ship owner and the Haenn Ship Ceiling and Refitting Corporation both failed to make proper inspections to determine whether the grain feeder in which the plaintiff was to perform his work was safe, they were negligent, and you will determine the extent or percentage that the negligence of each contributed to the accident. That, I think, is clear.

Now, the third party defendant, members of the jury, has asked me to charge you that under the law the ship was responsible in the first instance for the proper construction of the feeder and a similar duty rested upon the ship to maintain the feeder in a reasonably safe condition. That is true, but, after all, they were aboard it to repair the damaged burlap.

The fact that the feeder and the shifting board were only semi-permanent structures does not make the feeder and its appurtenant parts any the less a part of the equip-

ment furnished by the ship to the employees of Haenn. That is true.

Before you may find against Haenn you must be satisfied by a fair preponderance of the evidence that Haenn or its employees other than Baccile were careless or negligent, and that this carelessness or negligence caused or was a substantial contributing factor to the accident. The law defines legal cause as some breach of duty which is a substantial factor as well as an actual factor in bringing about injury. In this connection it is not enough that the accident would not have occurred had there not been negligence. That in itself is not sufficient. That, members of the jury, I explained to you with "preponderance of the evidence," and with "burden".

In order to warrant a finding that negligence is the proximate cause of an injury it must be shown that the injury was the natural and probable consequence of the negligence or wrongful act, and that substantial harm should have been foreseen before the accident in the light of the pending circumstances. You can not go wrong in keeping that thought with you always, throughout your whole deliberations.

In this action the defendant, Halcyon, has the burden of proof, and it must prove by a fair preponderance of the evidence that the Haenn Company was negligent so as to have caused or substantially contributed to the accident. If the evidence does not satisfy you, or if you find that the evidence is evenly balanced, then your verdict must be for Haenn.

Gentlemen, is there anything?

MR. BYRNE: There will be certain exceptions, I am sure.

THE COURT: Do you have anything to say, Mr. Mount?

MR. MOUNT: No, sir; not to the charge as given aside from the points that we have had rulings on before.

THE COURT: Yes, gentlemen, we have taken that up and discussed it.

MR. MOUNT: Yes.

THE COURT: You each have exceptions there.

MR. BYRNE: I understand that, Your Honor.

THE COURT: Do I have that interrogatory?

MR. BYRNE: Do you wish to hear exceptions now or after the jury has gone out?

THE COURT: I will hear them now and correct them if I can.

(Conference at side bar reported as follows:)

THE COURT: Here are the interrogatories.

MR. BYRNE: Your Honor, these are just general exceptions to your charge.

THE COURT: Yes.

MR. BYRNE: I except to so much of the Court's charge as defined the issues affirmed by the pleadings and the judgment which has been entered against the defendant Halcyon.

I except to so much of the Court's charge as indicates that negligence is the only issue in this case. It seems to me that unseaworthiness is also just as much a part of this case.

THE COURT: I will overrule you on that. Seaworthiness has no part in here.

MR. BYRNE: I really have to take these exceptions. I would just as soon take them out of the hearing of the jury. At two places during the Court's charge you spoke to them about how they would interpret the contract. I say to you, sir, that the interpretation of any contract is for the Court, and there is no material conflict as to this contract. I say that the interpretation of this contract is not for this jury, but it is for this Court.

THE COURT: All right; I think I will go that far. It is an oral contract, and I think I will tell the jury that there

is no material conflict between the parties with respect to the contract.

MR. BYRNE: What is the contract? I think the Court has to tell them that.

THE COURT: What is that?

MR. BYRNE: I think the Court has to tell them what the contract is.

THE COURT: I will tell them, if you want me to repeat it.

MR. BYRNE: My judgment is that as far as number 2 feeder is concerned, the contract is merely to tack up the burlap.

THE COURT: Well, the whole thing was to make it grain-tight. Make it grain-tight. What is the use of getting into that? I think I will let it alone.

Do you feel there is any real error in that?

MR. MOUNT: No. I think you might say to them that there is no material difference between the parties as to what the contract was.

THE COURT: This is like everything else—I made some notes in anticipation of charging tomorrow morning. What I gave them now was right out of my mind.

MR. BYRNE: I would also except to so much of the Court's charge as referred to the feeders and whether they were or were not a part of the ship's structure. The evidence in this case, it seems to me, is only that they were not a permanent part of the ship's structure. I think they were a part of the ship's structure as it was furnished to the Haenn Company.

THE COURT: I have said that its purpose was to haul grain. That is the only purpose that it served.

MR. BYRNE: I understand.

MR. MOUNT: That was covered in one of your points which was affirmed.

MR. BYRNE: You also said that Rickert did not stop to find out about the security of that plank, and I believe that his only purpose in tapping it was to find out whether it was cracked.

THE COURT: Yes, I said that, Mr. Byrne.

MR. BYRNE: I think Your Honor referred to Rickert and his test as foolish. I except to that portion of Your Honor's charge; and I also except to that portion of the charge which makes reference to the Haenn people going down to lift up the burlap and examine the cleat.

You also referred at one point to the fact that the question here was whether Halcyon and Baccile were entirely at fault or whether the Haenn Company was also at fault. I don't think that is the issue here.

THE COURT: No, no; did I say Halcyon and Baccile?

MR. BYRNE: Yes, Your Honor, you did.

THE COURT: Then I will correct that, because the issue is between Halcyon and Haenn Ship Celling and Refitting Corporation.

MR. BYRNE: You read to the jury this afternoon Mr. Mount's, or the third party plaintiffs', point number 4. This morning you indicated it was denied.

THE COURT: Yes.

MR. BYRNE: And you also commented.

MR. MOUNT: Well, he modified it.

THE COURT: Yes.

MR. BYRNE: You also commented after the first one of my points which you read, and you said, "But bear in mind this," and to my mind you completely withdrew the point.

THE COURT: What I read was this: "Under the law the ship was responsible in the first instance for the proper construction of the feeder and a similar duty rested upon the ship to maintain the feeder in a reasonably safe condition."

MR. BYRNE: Then you went on from that point and said, "But, ladies and gentlemen——"

THE COURT: That is right. That is right.

MR. BYRNE: I don't think you affirm points that way.

THE COURT: Why not? For your purposes, that is——

MR. BYRNE: I am asking an exception.

THE COURT: All right; I will say that I have extended by way of explanation point number 6 which I affirm, Mr. Byrne.

MR. BYRNE: That is right.

THE COURT: All right.

MR. BYRNE: I have said my piece.

THE COURT: The only thing for me to correct, then, would be to tell this jury, if I have said that they are to consider the negligence, you say, of Mr. Baccile and the Halcyon Lines——

MR. BYRNE: As I noted it, sir, I thought you said that the question for their determination here is whether Halcyon and Baccile were entirely at fault, or whether Haenn.

THE COURT: Yes——

MR. BYRNE: There is this, too, Judge McGranery. I most respectfully say that I do not understand the issue which you are submitting to this jury. Is it whether there was due care on both sides?

THE COURT: That is right.

MR. BYRNE: Or due care only or the part of Haenn.

THE COURT: Due care on both sides. I think I made it quite clear to the jury that the issue is that there was a duty on the part of the ship owner to furnish Baccile a reasonably safe place to work——

MR. BYRNE: Yes, I agree with that.

THE COURT: —there was a corresponding duty over, then, from the Haenn Company to the ship owner to do the work in a reasonably safe manner, and that that was their issue. Now, if they determine that the ship owner was solely liable, that is the end of the case.

MR. BYRNE: That is right?

THE COURT: If not, if the duty which the Haenn Company owed to the ship owner had been breached in that they had not performed it in a reasonably safe manner, there, I think, is where I used the words "foolish business." They would say what amount, what percentage. I think I used that.

MR. BYRNE: Yes.

THE COURT: Is that the issue? Do I make that clear as to how I am sending it to the jury?

MR. BYRNE: Oh, I think this is probably so, Judge McGranery.

(End of conference at side bar.)

THE COURT: Members of the jury, if I have made any reference to you with respect to the issue here as one in which you would consider negligence of Mr. Baccile along with the negligence of the ship owners, please disregard that. The issue is very simple. The issue is: Under the law Mr. Baccile was entitled to be furnished by the ship owners with a safe place in which he could perform this work. The Haenn Company had a corresponding duty over to the ship owners that they perform this work in a reasonably safe manner, and all of that will be determined with the full picture of all of the circumstances, bearing in mind that the standard of mentality used by the law is that of a prudent man. Under the circumstances, what would he do?

Now is that clear, members of the jury? If it is, then I have this interrogatory:

"Were the employees of Haenn Ship Ceiling and Refitting Corporation negligent so that they caused or substantially contributed to the injuries sustained by the Plaintiff Baccile?"

You will answer that "yes" or "no".

If your answer to that is "yes", then state the percentages by which the original defendant Halcyon and the third party defendant Haenn were negligent so as to contribute to the injuries sustained by the plaintiff.

Then we have a little line, "Haenn Ship Ceiling and Refitting Corporation," and the percentage.

"Those in charge of the S. S. 'Stad Vl[illegible]rdingen'" and the little line for the percentage.

That, members of the jury, is the case as simply as I know how to state it to you. Our additional juror will drop out, and you twelve will take this and give it the careful conisderation that it deserves, because this is the only day these parties will have in Court to present this issue for your determination.

Do the jurors want that model of the ship section? You may have it if you want it for any reason. I don't think there are any other exhibits.

MR. MOUNT: There are photographs.

THE COURT: All right, members of the jury, you may have whatever there is here in evidence. You may take it with you into the jury room for your deliberations.

(The alternate juror was excused.)

(The bailiff was duly sworn.)

(At 3:37 the jury retired to commence deliberations, taking with them the following exhibits: TP1, TP2, TP3, TP4 and TP5.)

(Third party plaintiffs submitted the following points for charge:

"1. There was a duty on the part of Haenn Ship Ceiling and Refitting Corporation, the employer of

Plaintiff Salvadore Baccile, to make an inspection and examination of the parts of the grain fittings which it had undertaken to repair, to furnish competent foremen and other persons to supervise the work, and to perform the work of repairing the grain fittings in the vessel in a careful and proper manner in order to prevent injury to the plaintiff.

2. The Haenn Ship Ceiling and Refitting Corporation was under a duty to the vessel owners to perform the work of repairing grain fittings in the vessel in a careful and proper manner.

3. The duty which the vessel owner owed to Salvadore Baccile, as a business guest was to furnish him a reasonably safe place in which to work, and to make inspections and examinations to ascertain the condition of the parts of the ship which he and his employer were engaged in repairing.

4. Where the vessel owner has given control of a part of the vessel to an independent contractor engaged to perform work in that part of the vessel, the vessel owner has no duty to supervise or control the manner in which the independent contractor and his employees perform the work.

5. If you find that the ship owner and the Haenn Ship Ceiling and Refitting Corporation both failed to make proper inspections to determine whether the grain feeder in which the plaintiff was to perform his work was safe they were negligent, and you will determine the extent or percentage that the negligence of each contributed to the accident.")

(Third party defendant submitted the following points for charge:

"1. Under all of the evidence your verdict must be for the Third Party Defendant, Haenn Ship Ceiling and Refitting Corporation.

2. The Original Defendant, Halcyon Lines, has settled the claim of Baccile against it by agreeing to the entry of a judgment in favor of Baccile and against Halcyon in the sum of Sixty-Five Thousand Dollars ($65,000.00).

Halcyon, having settled with Baccile, is here suing Baccile's employer, Haenn, in order to recover a portion of the payment it has made to Baccile. Halcyon can recover in this suit only if you find as a fact that Haenn was careless or negligent in some way which either caused or substantially contributed to Baccile's accident.

3. Halcyon would be liable to Baccile only if it had been itself at fault and you are entitled to consider that fact in determining whether there was any negligence on the part of Haenn separate and distinct from the negligence of Halcyon and if you further find that the negligence of Haenn was a substantial factor in contributing to Baccile's accident.

4. The shipowner, Halcyon, owed to Haenn and to all of Haenn's employees a non-delegable duty to furnish them with a reasonably safe place in which to perform their work.

5. If you find that the stage planking in the No. 2 feeder was placed there with the intention that the men should work upon it and you further find that Haenn relied upon that fact, then your verdict must be in favor of Haenn.

6. Under the law the ship was responsible in the first instance for the proper construction of the feeder and a similar duty rested upon the ship to maintain the feeder in a reasonably safe condition.

7. The fact that the feeder and the shifting board were only semi-permanent structures does not make the feeder and its appurtenant parts any the less a

part of the equipment furnished by the ship to the employees of Haenn.

8. When the ship turned over the feeder with the stage plank already constructed inside it for the purpose of being used to install or repair the burlap lining of the feeder, the Haenn Company and all of its employees were entitled to assume that the stage plank was in normally fit condition to be used for the purpose for which it had been installed.

9. The fact that the stage plank gave way under the circumstances which have been shown here is itself sufficient evidence that the stage plank was weak and not sufficient for the purpose for which it had been intended. If you find that the ship furnished such equipment then your verdict must be in favor of the Haenn Corporation.

10. Before you may find against Haenn you must be satisfied by a fair preponderance of the evidence that Haenn or its employees other than Baccile were careless or negligent and that this carelessness or negligence caused or was a substantial contributing factor to the accident. The law defines legal cause as some breach of duty which is a substantial factor as well as an actual factor in bringing about injury. In this connection it is not enough that the accident would not have occurred had there not been negligence. That in itself is not sufficient.

In order to warrant a finding that negligence is the proximate cause of an injury it must be shown that the injury was the natural and probable consequence of the negligence or wrongful act and that substantial harm should have been foreseen before the accident in the light of the attending circumstances.

11. The uncontradicted evidence in this case is that the Captain of the Vessel, Kuipers, knew that the grain

feeders had been damaged during unloading of the ship at Rotterdam. There is no evidence that anyone on behalf of the ship warned or notified the Haenn Company or any of its employees of this fact and the only evidence before you is that the Haenn Company was instructed by Captain Campbell acting on behalf of the ship, to repair the torn burlap in the No. 2 feeder. There is a duty to warn a person who comes upon a vessel of a danger which is known to the shipowner or the Officers of the ship and unless you find as a fact that the Haenn Company knew that there had been damage to the No. 2 feeder aside from the tearing of the burlap, your verdict must be for the Defendant, Haenn.

12. In this action the Defendant, Halcyon, has the burden of proof and it must prove by a fair preponderance of the evidence that the Haenn Company was negligent so as to have caused or substantially contributed to the accident. If the evidence does not satisfy you or if you find that the evidence is evenly balanced, then your verdict must be for Haenn.")

(The jury returned at 5:30 P. M.)

THE CLERK: Members of the jury, please rise.

(The jury rose.)

THE CLERK: Members of the jury, have you agreed upon your special verdict by answering the interrogatories which were submitted to you?

THE FOREMAN: Yes.

THE CLERK: May I have them, please.

(A paper was handed to the clerk.)

THE CLERK: Members of the jury, what is your answer to interrogatory number 1, which reads as follows:

"Were the employees of Haenn Ship Ceiling and Refitting Corporation negligent so that they caused or

substantially contributed to the injuries sustained by the Plaintiff Baccile?"

What is your answer to that interrogatory?

THE FOREMAN: Yes.

THE CLERK: What is your answer to interrogatory number 2:

"If your answer to Interrogatory No. 1 is yes, then state the percentage by which the Original Defendant Halcyon and the Third Party Defendant Haenn were negligent so as to contribute to the injuries suffered by the plaintiff."

What is your answer to that interrogatory as it relates to Haenn Ship Ceiling and Refitting Corporation?

THE FOREMAN: Seventy-five per cent.

THE CLERK: What is your answer to that interrogatory as it relates to those in charge of the S. S. "Stad Vlaardingen"?

THE FOREMAN: Twenty-five per cent.

THE CLERK: Members of the jury, hearken to your special verdict as the Court has recorded it in the issue joined wherein Halcyon Lines and Vinke Company are third party plaintiffs and the Haenn Ship Ceiling and Refitting Corporation is third party defendant, you say your answer to interrogatory number 1 is yes, and that your answer to interrogatory number 2, as relates to Haenn Ship Ceiling and Refitting Corporation is seventy-five per cent, and as it relates to those in charge of the S. S. "Stad Vlaardingen" is twenty-five per cent, and so say you all.

THE JURY: Yes.

THE COURT: Any questions, gentlemen?

(No response.)

THE COURT: The verdict should be recorded.

MR. MOUNT: If the Court please, I move that Your Honor direct the jury to bring in a verdict in favor of the third party plaintiffs and against the third party defendant in the amount of seventy-five per cent of $65,000, which I figure to be $48,750.

THE COURT: I will not do that, Mr. Mount, but I will direct that the special findings of the jury be entered as found by them, and that verdict, members of the jury, is seventy-five per cent of the liability to be imposed against the Haenn Ship Ceiling and Refitting Corporation and twenty-five per cent against the ship owners. That is your verdict. So that for the purposes of amount we may take care of that later.

The jury has not had any official knowledge as to amount, so I should think unless we have some very serious objection to that, I would prefer to handle it that way.

MR. MOUNT: I wish to make of record the amount and ask that the Court either direct the jury or the Court itself mold the verdict.

THE COURT: I think we can do that.

MR. MOUNT: I think that probably can be done otherwise.

THE COURT: I think we can do it. The question is that we understand the jury and that they understand what their verdict is, and that was abundantly clear.

MR. MOUNT: All right, sir.

THE COURT: Thank you, members of the jury.

* * *

OPINION.

April 3, 1950

McGRANERY, *J.*

This is an action brought by Salvadore Baccile, an employee of the Haenn Ship Ceiling and Refitting Corporation (Haenn), against Halcyon Lines and Vinke and Company (Halcyon), the owners and operators of the vessel "Stad Vlaardingen". On November 25, 1946, while the vessel was moored at Girard Point, Philadelphia, Haenn was engaged by Halcyon to perform certain work aboard her, including the work of making the ship's grain feeders "grain tight". The grain feeders had been installed by a stevedoring company in Montreal, Canada, and a subsequent journey with a cargo of grain had resulted in some damage to the fittings. Within the number 2 feeder there was a stage planking, about 10 inches wide, supported on cleats nailed to opposite bulkheads of the feeder, at a height of about 30 feet above the bottom of the hold. It appeared from the evidence that this planking had been built and left by the stevedoring company which had installed the feeders. The plaintiff Baccile, one of the carpenters Haenn had sent to work on the ship, and his foreman proceeded to the number 2 feeder with a ladder, part of Haenn's equipment, and lowered it onto the planking. They tapped the planking with the bottom rung of the ladder, in an effort to "sound" for cracks and test for sturdiness. Baccile then climbed down the ladder to the staging, the ladder meanwhile resting on the plank, unsecured at the top except for the foreman's hold on it. After maneuvering himself behind the ladder on the planking, in a situation of precarious balance, and advancing toward the corner of the feeder where the loose burlap lining needed tightening, Baccile felt the staging give. Before he could make any effective move for his safety, the structure collapsed, precipitating him to the bottom

of the hold and causing him serious and permanent injuries.

The defendants, after the commencement of the suit, impleaded Haenn. Before trial it was agreed by all parties that a judgment be entered in favor of Baccile against Halcyon, the original defendants, with the understanding that this judgment would not be appealable and that it would be paid in full settlement; the issue should then proceed to trial for a determination of liability between Halcyon, the third-party plaintiff, and Haenn, the third-party defendant.

In submitting the issue to the jury the Court instructed that Halcyon had a duty to provide a reasonably safe place for Haenn's employees to work, and that Haenn had a duty to perform the work in a reasonably safe manner. In order to assist the jury in their deliberations, the Court submitted interrogatories for them to answer. In answering the interrogatories, the jury found that both parties had been negligent, contributing to the injuries suffered by the plaintiff, and apportioned the negligence between the parties in the ratio of 75% to Haenn and 25% to Halcyon.

Haenn, the third-party defendant, now moves for a judgment notwithstanding the verdict, for a new trial, and, in the event of the denial of both, for a molding of the verdict so that the third-party plaintiff may recover from the third-party defendant only 50% of the judgment entered in favor of the original defendant.

In support of its motion for a judgment notwithstanding the verdict the third-party defendant takes the position that, as a matter of law, there can be no recovery against it because the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901 et seq. precludes any recovery against the employer beyond the limit of its liability as prescribed by that Act. Inasmuch as Haenn has secured the payment of compensation to Baccile, under Section 4 of the Act, it is, under Section 5,

immune from direct recovery against it by the plaintiff. Without undertaking to engage in an extended discussion, it is my opinion that there is both reason and authority for the proposition that immunity from direct suit furnishes no defense to Halcyon's claim for contribution. Rich v. U. S., 177 F. 2d 688; Portel v. U. S., 85 F. Supp. 458; Coal Operators Gas Co. v. U. S., 76 F. Supp. 681; Christon v. U. S., 8 F. R. D. 327; The S. S. Samovar, 72 F. Supp. 574; Severn v. U. S., 69 F. Supp. 21; Green v. War Shipping Administration, 66 F. Supp. 393; The Tampico, 45 F. Supp. 174; Rederii v. Jarka Corp., 26 F. Supp. 304; see also, American Stevedores v. Porello, 330 U. S. 446, 458; Barbarino v. Stanhope S. S. Co., 151 F. 2d 553, 555; Cataldo v. A/S Glittore, 41 F. Supp. 555, 557.

Haenn argues that there may be no right of contribution against it because it was not a joint tort feasor with Halcyon, in that it had no liability to Baccile in common with Halcyon, nor were the parties *in pari delicto*. Concededly, in view of Section 5 of the Compensation Act, Haenn was in no way liable directly to Baccile; but, by virtue of its negligence in contributing to the cause of Baccile's injury, it thereby breached a duty, which it owed to the ship-owner Halcyon, of performing the work on the ship with due care. For the breach of this duty, Haenn is liable to Halcyon. Even though, technically, the satisfaction of this liability might not be the contribution of a joint tort feasor, Haenn must contribute to Halcyon a share of the total damages due Baccile from Halcyon, which damages resulted from the negligent conduct of both defendants. The right to contribution between wrongdoers here does not stand on subrogation, but arises directly from the tort. See The Tampico, supra, page 175.

Haenn also asks for a verdict to be directed in its favor on the ground that there was no disputed issue of fact to be submitted to the jury. Apparently the third-party defendant assumes that the only negligence which could have been found by the jury was based upon Haenn's failure

to make an inspection of the condition of the cleats supporting the plank. Because there was no evidence that such an inspection would have disclosed a defect, it is urged that there was no duty to inspect. See Bruszewski v. Isthmian S. S. Co., 163 F. 2d 720. However, the record discloses other evidence from which the jury might properly have found that Haenn did not perform the work in a reasonably safe manner, under the Court's instruction, by undertaking to do the work in the manner in which it did, at a height of some thirty feet above the bottom of the vessel. Particularly pertinent in this connection is the testimony of the master of the vessel as to how, in his expert opinion, the work should have been performed, by the use of a Jacob's ladder or lashed hatch boards; the testimony of the boatswain Westerhoff that he performed a similar operation (cleaning the grain feeder) by lowering himself into the feeder with a rope ladder and using a hatch cover to stand on; and the testimony of the Chief Surveyor for the Board of Underwriters of New York and Philadelphia that the stage planking served no useful purpose in connection with the grain feeder, but was merely put in for the covenience of the grain fitter in erecting the fittings.

In urging a new trial, the third-party defendant cites as error the refusal of the Court to charge the jury that "The fact that the stage plank gave way under the circumstances which have been shown here is itself sufficient evidence that the stage plank was weak and not sufficient for the purpose for which it had been intended. If you find that the ship furnished such equipment then your verdict must be in favor of the Haenn Corporation." It is contended that the Court erred in denying this instruction under the "seaworthiness" doctrine of the Sieracki case, supra. However, assuming that the "seaworthiness" doctrine of that case extends to a carpenter employed by an independent contractor, the mere fact that the plank gave way is not sufficient evidence that the plank was defective.

It is a permissible inference that the plank gave way because it was used in a manner in which it was not intended to be used. Consequently the refusal of the charge was not an erroneous application of the doctrine of seaworthiness.

With respect to the molding of the verdict, Haenn moves the Court to provide that Halcyon may obtain recovery only to the extent of 50% of the judgment, which has been entered against Halcyon in favor of Baccile, notwithstanding the fact that the jury determined Haenn to have been 75% responsible. Although the Court did require the jury's determination of comparative negligence, upon further reflection, I have come to the conclusion that it is the duty of the Court to mold the verdict in accord with the principles of contribution between joint tort feasors under the maritime law. There is no doubt that the suit concerns a maritime tort, and that principles of admiralty law should govern. Seas Shipping Co. v. Sieracki, 328 U. S. 85, 88; Garrett v. Moore-McCormack, 317 U. S. 239; Apica v. Penn. Warehousing & Safe Deposit Co., 74 F. Supp. 819. Except for the operation of the Longshoremen's and Harbor Workers' Act, Haenn and Halcyon are joint tort feasors. The usual rule in admiralty, in the absence of contract, is equal contribution between joint tort feasors. American Stevedores v. Porello, 330 U. S. 446, 458. Conceding that "comparative negligence is not unknown to our maritime law", ibid., and recognizing that the Court could exercise its "conscientious discretion to give or withhold damages upon enlarged principles of justice and equity," The Explorer, 20 Fed. 135, 139; see also, Coal Operators Gas Co. v. U. S., 76 F. Supp. 681, 683; Portel v. U. S. supra; Guerrini v. U. S., 167 F. 2d 352; nevertheless, I am constrained, in the circumstances of this case, to abide by the general admiralty rule of equal contribution.

Accordingly, an order will be entered denying the motions for judgment notwithstading the verdict and for a

new trial, and directing that judgment be entered in favor of the third-party plaintiff against the third-party defendant for 50% of the judgment entered against the third-party plaintiff in favor of the original plaintiff.

ORDER.

AND NOW this 3rd day of April, 1950, in the above-entitled case, it is ORDERED that the third-party defendant's motions for judgment notwithstanding the verdict and for a new trial, be and hereby are

DENIED;

AND IT IS FURTHER ORDERED that judgment be entered in favor of the third-party plaintiff against the third-party defendant in the amount of Thirty-two Thousand and Five Hundred Dollars ($32,500.00).

(s) McGRANERY, J.

[fol. 181] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,213

SALVADORE BACCILE, Plaintiff,

vs.

HALCYON LINES (Halcyon Lijn), VINKE AND COMPANY, Defendants and Third-Party Plaintiffs, Appellee,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant, Appellant

STIPULATION

Subject to the approval of this Court, it is hereby stipulated by and between counsel for the parties that the time within which the Appellant may prepare and file its brief and appendix in the above-captioned case is hereby extended to and including August 15, 1950.

The reason this extension is requested is that the press of other business including the preparation of briefs before this Court and the preparation of cases for trial in the United States District Court has prevented counsel for the [fol. 182] Appellant from preparing the brief.

Rawle & Henderson, by Joseph Henderson, Counsel for the Appellee; Krusen, Evans & Shaw, by T. E. Byrne, Jr., Counsel for the Appellant.

Approved: Kalodner, C. J.
June 23, 1950.

(Received & Filed June 23, 1951. Ida O. Creskoff, Clerk.)

[fol. 183] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,213

SALVADORE BACCILE, Plaintiff,

vs.

HALCYON LINES (Halcyon Lijn), VINKE AND COMPANY, Defendants and Third-Party Plaintiffs, Appellee,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant, Appellant

STIPULATION

Subject to the approval of this Court, it is hereby stipulated between counsel for the parties that the time within which the Appellant may prepare and file its brief in the above case is hereby extended to and including September 15, 1950.

The reason this extension is requested is that the press of other business and vacation of counsel has prevented counsel for the Appellant from preparing the brief.

Rawle & Henderson, by Joseph M. Henderson, Counsel for Appellee; Krusen, Evans & Shaw, by T. E. Byrne, Jr., Counsel for Appellant.

Approved: Goodrich, C. J.
Aug. 17, 1950.

(Received & Filed Aug. 17, 1950. Ida O. Creskoff, Clerk.)

220

[fol. 184] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,213

SALVADORE BACCILE

v.

HALCYON LINES (Halcyon Lijn), VINKE AND COMPANY, Defendants and Third-Party Plaintiffs,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant, Appellant

No. 10,219

SALVADORE BACCILE

v.

HALCYON LINES (Halcyon Lijn), VINKE AND COMPANY, Defendants and Third-Party Plaintiffs, Appellants

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant

Appeals from the United States District Court for the Eastern District of Pennsylvania

Argued November 14, 1950

Before McLaughlin, Kalodner and Staley, Circuit Judges

[fol. 185] OPINION OF THE COURT—Filed February 21, 1951

By KALODNER, Circuit Judge:

Salvadore Baccile was employed by Haenn Ship Ceiling and Refitting Corporation ("Haenn"), a Pennsylvania corporation engaged to do work aboard the "Stad Vlaardingen", a vessel owned and operated by Halcyon Lines and Vinke and Company ("Halcyon"), corporation of

The Netherlands. At the time involved, the "Stad Vlaardingen" was in the port of Philadelphia, Pennsylvania. Baccile was working in the No. 2 grain fitting of the vessel when a plank on which he was standing gave way, so that he fell approximately thirty feet to the bottom of the hold and sustained serious injuries. He then brought this action at law against Halcyon, and Halcyon filed a third-party complaint against Haenn, alleging in the amended complaint, that either Haenn was solely accountable for Baccile's injuries, or it was liable to contribute to any judgment obtained by Baccile against Halcyon.

Halcyon settled Baccile's claim for $65,000, and agreed to the entry of judgment against themselves in that amount, apparently upon an arrangement with Haenn not recited in the record. Halcyon then proceeded with the trial of their claim for contribution against Haenn. On specific interrogatories, the jury determined that Haenn was negligent and that 75% of Baccile's damages was attributable to it. The District Judge, however, molded the verdict to equal liability, and accordingly gave judgment to Halcyon against Haenn for 50% of the amount Halcyon had agreed to pay Baccile. The integrity of the settlement, or the propriety of the amount of it, was not questioned by Haenn in the court below, nor is it now.

Both Halcyon and Haenn appeal: Haenn, in No. 10,213, because of the judgment against it, and Halcyon, in No. [fol. 186] 10,219, because of the action of the District Judge in altering the jury verdict. The substance of Halcyon's contentions is that the admiralty law recognizes comparative contribution and the trial judge was without warrant upon the record to alter the verdict. The substance of Haenn's contentions is, first, that it was not guilty of negligence, but if it were, the only negligence lay in its failure to inspect, for which it would be entitled to indemnity from Halcyon, in any event, since Halcyon owed the primary duty to furnish a safe place to work; and second, that its exclusive liability is to pay compensation to its injured employee under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901, et seq., pursuant to which it had secured the payment of compensation to its employees. Haenn also asserts error in the court below in the admission of certain evidence relating to the performance of its work.

On a review of the record, we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn negligent, not merely in failing to inspect, but as well in failing to go about its work properly. Nor do we regard it as error for the trial court to have admitted the evidence of what Haenn "could have done". That testimony was given by an experienced and qualified seaman. It furnished the jury with knowledge, in a specialized field, of the alternatives available to Haenn which the jury might not otherwise appreciate. The jury were thus enabled to determine, from all of the evidence, whether Haenn went about its work in a reasonable manner. But even if the admission of this testimony were error, we do not regard it of such prejudicial stature as to demand a new trial for correction.

We reach, then, the significant question whether, as between the mutual wrongdoers Halcyon and Haenn, the Longshoremen's and Harbor Workers' Compensation Act is in any degree a defense to Halcyon's claim for contribu- [fol. 187] tion. Upon principles of the controlling maritime law,[1] our answer is that Haenn has a liability over to Halcyon, limited, however, by the amount of compensation payable to Baccile had he elected, as was his right,[2] to receive compensation under the Act.

In so deciding we are cognizant that contribution between tortfeasors is generally predicated upon a common liability, which in this situation has been held not to exist. American Mutual Liability Co. v. Matthews, 182 F.(2d) 322 (2d Cir. 1950). As Professor Prosser points out,[3] the term "joint

[1] Cf. Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 88 (1946); Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239 (1942).

[2] 33 U.S.C.A. §933(a): "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Administrator may provide, to receive such compensation or to recover damages against such third person."

[3] Prosser on Torts (1941) §§47, 109. See also Bohlen, Contribution And Indemnity Between Tortfeasors, 21 Cornell Law Quarterly 552 (1936).

"tortfeasors" is the subject of much confusion; and where contribution, which could be had at common law only in particular situations, is allowed, liability *in solido* is accounted for by the difficulty of assessing the actual damages attributable to the respective tortfeasors. In a strict sense it may be said that no common liability exists here because Haenn was responsible to Baccile for compensation regardless of its fault, but not in a greater amount than provided in the statutory schedule. Notwithstanding, literal adherence to concepts derived from the common law would not seem appropriate in a system of jurisprudence that has developed rules according to its own sense of right,[4] even contrary to those of the common law. The admiralty law early recognized that contributory negligence was not necessarily a bar to recover,[5] and it devised the "moiety rule" to satisfy a singular desire "for a better distribution [fol. 188] of justice between mutual wrongdoers."[6] And where comparative negligence is said to be "not unknown",[7] the requirement of common liability cannot be deeply ingrained, for the equity of the one is inconsistent with the concept of liability *in solido* attaching to the other. While Haenn was responsible to Baccile regardless of its fault, Haenn's negligence in fact brought to fruition his right to compensation. In a pragmatic sense, therefore, Haenn and Halcyon were, to use the preferable admiralty law description, "mutual wrongdoers".

In the absence of compelling reason to the contrary, we should be unwilling to accept as satisfactory the conclusion necessary to Haenn's position here, that an injured person, by unhampered election, may cast upon one of his two wrongdoers the entire burden of his loss. The compelling reason advanced is the Compensation Act. We shall see.

As between the employer and a stranger contributing to the injury of an employee, the Act unquestionably falls

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[4] The Max Morris, 137 U.S. 1 (1890), at page 14: "All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper."

[5] Ibid.

[6] The Alabama, 92 U.S. 695, 697 (1876).

[7] American Stevedores, Inc. v. Porello, 330 U.S. 446, 458 (1947).

short of cover. It provides, as we have already noted, that the employee may sue a third party in lieu of taking compensation from his employer. But if the employee fails in such action to recover as much as the statutory compensation, the employer must stand for the shortage. 33 U.S.C.A. §933(f). Where the employee accepts compensation under an award, the employer automatically becomes the assignee of the employee's right against the third party. 33 U.S.C.A. §933(b). And if the employer succeeds in recovering more than he has paid as compensation, such excess less costs of enforcement belongs to the employee. 33 U.S.C.A. §933(e). Only incidentally to the rights of employee and employer, *inter se*, are we made aware of the employer's independent right to repay to himself out of his recovery as assignee the compensation already paid to his employee. But this is in accordance with accepted prin-
[fol. 189] ciples,[8] to the extent that the employer's own fault is not involved.

Manifestly the concern of the Act is the employer-employee relationship. Its objective is social in character and its method of effectuating the social policy is to force upon industry a real cost of its productive operations. The Act, nevertheless, does not say that employers shall be free of liability when they are at fault. Rather, it fixes the quantum of liability as an equitable adjustment for imposing responsibility where none was recognized previously hence, the fault of the employer, vis-à-vis his employee, is irrelevant in this limited sphere.

The Act strongly indicates, therefore, that the legal relations between the employer and the third party who injures his employee are not completely remodeled. And while it is not now a question here, we should hardly conclude that §933, 33 U.S.C.A., creates in the negligent employer a right to fully recover from the negligent third party compensation already paid by the employer to his employee. Otherwise the burden of the injured employee would weigh inevitably and exclusively upon the third party, whose misfortune it is to hurt one within the Act.[9]

[8] Cf. The Etna, 138 F. (2d) 37 (3rd Cir. 1943).

[9] This Court has held, The Etna, supra, note 8, that the employee is not entitled to compensation as a dessert to his main recovery against the stranger. See also, American Stevedores, Inc. v. Porello, 330 U.S. 446, 455 (1947).

It is not merely too much a matter of chance; it is apparently inconsistent with the policy of the Act, which is to fix the employer's liability, not to provide him with a convenient escape from responsibility. In the situation here, were all recovery denied to one in the position of Halcyon, it should be said not only that the entire burden *may* fall upon him because of the employee's elective rights, but also that it would undoubtedly fall upon him, for it is too much to expect of human nature that the employer should not attempt to influence his employee in the exercise of his election; and failing that, the employer could assure himself of the recovery of paid compensation through 33 U.S.C.A. [fol. 190] §933(e) by forcing an award under 33 U.S.C.A. §933(b), which, as noted, operates as an assignment of the employee's right of action.[10] This would be true unless, of course, it should be determined that the employee may have both damages and compensation, a result not indicated by the Act.

Nevertheless, the device of the Act must be frustrated if the negligent employer is subject to full contribution. For then the third party is merely the conduit between employer and employee for the transfer of damages in excess of compensation. The solution which we adopt here at once preserves inviolate the forward-looking objectives of the Act, and consistent with those objectives retains a substantial measure of equity in the legal relations between the employer and the third party. Since the statute intends to render the employer liable even without fault, we can find no reason why the employer should not, where he is a cause of harm and therefore without right of full recourse, be required to admit of contribution to the extent of the compensation he would have had to pay to the employee, had the employee not elected to sue the third party. Nor do we think it an insuperable obstacle that the result we reach does not satisfy the historical notions of the relation between tortfeasors. The Act has intervened in their affairs,

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[10] The Amendment of the Act in 1938 to provide for the automatic assignment of the employee's right against the stranger only in the case of an award was intended to further protect the substance of the employee's right of election. See American Stevedores, Inc. v. Porello, supra, note 9, at pages 454-456.

and in so responsive a system as the admiralty, we have no difficulty in reaching the equitable solution to a problem not previously contemplated by judicial expressions.

Finally, in view of our holding, we are not required to determine whether the District Judge erred in altering the jury's verdict. Under either the jury verdict or the judgment entered, the sum granted to Halcyon exceeds the statutory compensation for which Haenn was liable to Baccile. [fol. 191] Accordingly, the judgment of the District Court will be reversed, and the cause remanded for the entry of judgment consistent herewith.

A true Copy. Teste:

——— ———, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 192] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,219

SALVADORE BACCILE

vs.

HALCYON LINES (Halcyon Lijn), VINKE AND COMPANY, Defendants and Third-Party, Plaintiffs, Appellants,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party, Defendant

Present: McLaughlin, Kalodner and Staley, Circuit Judges.

It is hereby Ordered that the parties to the above appeal bear their own costs in this court.

By the Court, Kalodner, Circuit Judge.

February 21, 1951.

(Received & Filed Feb. 21, 1951. Ida O. Creskoff, Clerk.)

[fol. 193] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,213

SALVADORE BACCILE

vs.

HALCYON LINES (Halcyon Lijn), VINKE AND COMPANY, Defendants and Third-Party, Plaintiffs,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party, Defendant, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLaughlin, Kalodner and Staley, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause remanded for the entry of judgment consistent with the opinion of this court; each side to bear its own costs in this court.

Attest:

February 21, 1951. Ida O. Creskoff, Clerk.

(Received & Filed Feb. 21, 1951. Ida O. Creskoff, Clerk.)

[fol. 194] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,219

SALVADORE BACCILE

vs.

HALCYON LINES (Halcyon Lijn), VINKE AND COMPANY, Defendants and Third-Party, Plaintiffs, Appellants,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party, Defendant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLaughlin, Kalodner and Staley, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause remanded for the entry of judgment consistent with the opinion of this court; each side to bear its own costs in this court.

Attest:

Ida O. Creskoff, Clerk.

February 21, 1951.

(Received & Filed Feb. 21, 1951. Ida O. Creskoff, Clerk.)

[fol. 195] [Stamp:] Received & Filed Apr. 5, 1951. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 10,213 and 10,219

SALVADORE BACCILE, Plaintiff,

vs.

HALCYON LINES (Halcyon Lijn), VINKE AND COMPANY, Defendants and Third-Party, Plaintiffs, Appellant-Appellee,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party, Defendant, Appellant-Appellee

PETITION FOR STAY OF MANDATE

To the Honorable, the Judges of Said Court:

The Petition of Halcyon Lines and Vinke and Company, by their attorneys, Rawle & Henderson, respectfully shows to your Honorable Court, as follows:

1. Petitioners are appellants in Appeal No. 10,213 and Appellee in No. 10,219.

2. On February 21, 1951, your Honorable Court entered judgments reversing the judgments of the Court below and in effect dismissed the Appeal of the Petitioner in No. 10,213.

3. The Petitioners desire to file Petitions for Writs of Certiorari in both of the above appeals.

[fol. 196] 4. Counsel for Petitioners have only recently been instructed to file Petitions for Writs of Certiorari.

5. It is averred that this Petition is not filed for the purposes of delay but in order to enable Counsel to prepare and file Petitions for Writs of Certiorari within the time allowed therefor by the Statutes of the United States.

Wherefore your Petitioners pray that your Honorable Court enter an Order staying the Mandate in both of the

above Appeals for a period of ninety (90) days from February 21, 1951.

And your Petitioners will ever pray, etc.

Rawle & Henderson, by J. M. Henderson, Attorneys for Petitioners, 1910 Packard Building, Philadelphia 2, Pa.

So Ordered. Kalodner, J.
4-6-51.

[fol. 197] STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Thomas F. Mount, being duly sworn according to law, deposes and says that he is a member of the firm of Rawle & Henderson, Counsel for the petitioners named in the foregoing Petition and that said Petition is not filed for purposes of delay but to enable Counsel to file Petitions for Writs of Certiorari.

Thomas F. Mount.

Sworn to and Subscribed before me this 4th day of April, 1951. Harrison G. Kildare, Notary Public. My Commission Expires Jan. 25, 1955. (Seal.)

[fol. 198] [Endorsed:] United States Court of Appeals for the Third Circuit, Nos. 10,213 and 10,219. Salvadore Baccile vs. Halcyon Lines (Halcyon Lijn), Vinke and Company and Haenn Ship Ceiling and Refitting Corporation. Petition for Stay of Mandate.

[fol. 199] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix for Appellant and proceedings in this court in the case of Salvadore Baccile vs. Halcyon Lines (Halcyon Lijn) Vinke and Company, Defendants and Third-Party Plaintiffs, and Haenn Ship Ceiling and Refitting Corporation, Third-Party Defendant, Appellant, No. 10,213, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 30th day of April in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the United States the one hundred and seventy-fifth.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

(4615)

[fol. 241] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 62

HALCYON LINES and VINKE AND COMPANY, Petitioners,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION

ORDER ALLOWING CERTIORARI—Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 242] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 197

HAENN SHIP CEILING AND REFITTING CORPORATION, Petitioner,

vs.

HALCYON LINES and VINKE AND COMPANY

ORDER ALLOWING CERTIORARI—Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 242] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

HAENN SHIP CEILING AND REFITTING CORP., Petitioner,

vs.

SALVADORE BACCILE, and HALCYON LINES (Halcyon Lijn) VINKE AND COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 20, 1951.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 11th day of May, 1951.

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Supreme Court, U. S.
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MAY 18 1951
CHARLES ELMORE CROPLEY
Clerk

IN THE

Supreme Court of the United States

October Term, 1950. 51

No. 62

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
GEORGE M. BODDHEAD,
1910 Packard Building,
Philadelphia 2, Pa.,
Counsel for Petitioners.

International, 236 Chestnut St., Phila. 6, Pa.

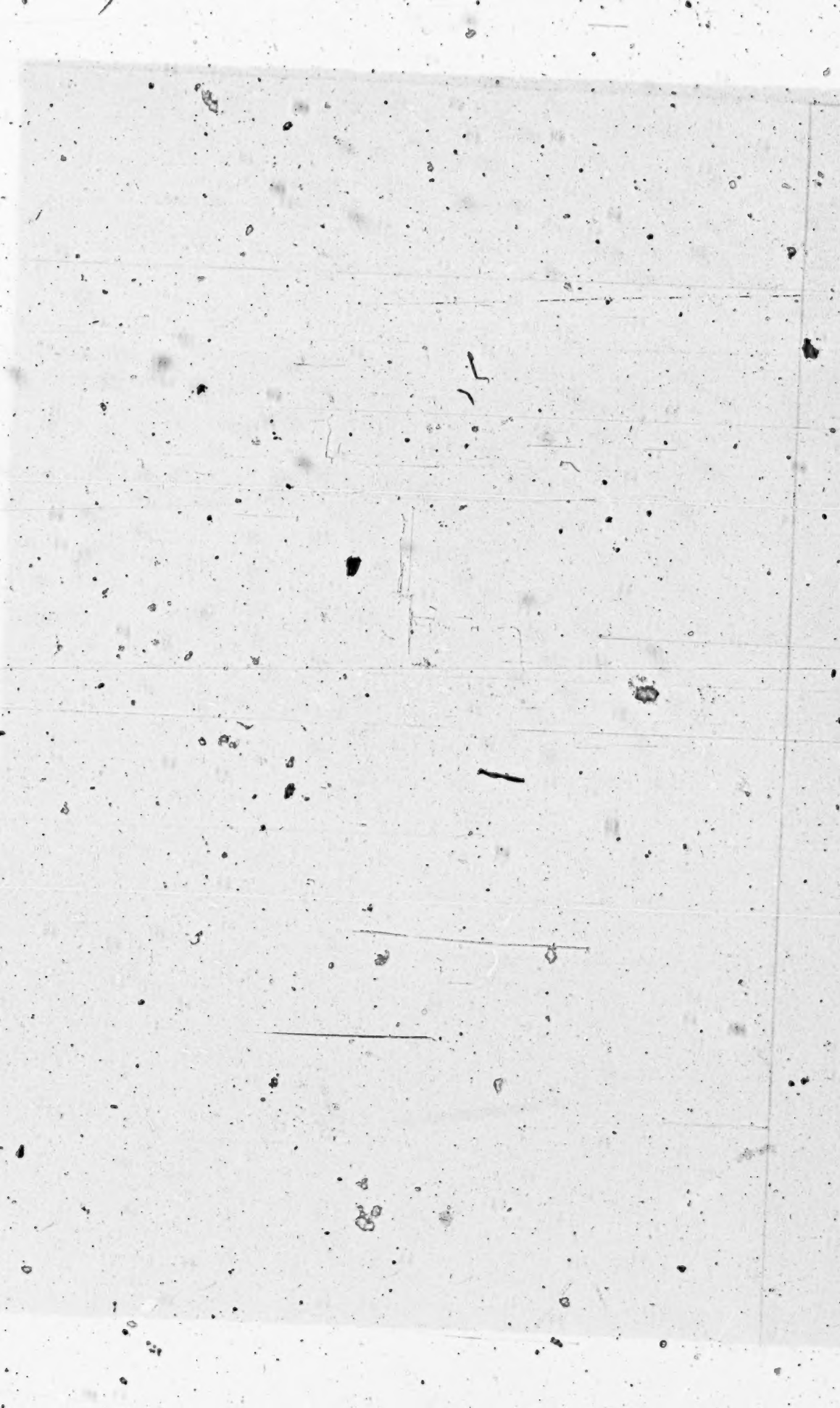

TABLE OF CONTENTS OF PETITION.

	Page
Summary and Statement of Matter Involved	1
Jurisdiction	5
Opinions Below	5
Questions Presented	5
Reasons for Granting the Petition	6

TABLE OF CASES CITED IN PETITION.

	Page
American Mutual Liability Ins. Company v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950)	6, 7, 8
American Stevedores, Inc. v. Porello, 330 U. S. 446 (1947)	8
Hitaffer v. Argonne Co., 183 F. (2d) 811 (C. C. A. D. of C. 1950) cert. den. 340 U. S. 852	6, 7
Liberty Mutual Insurance Co. v. Vallendingham, 94 F. Supp. 17 (D. C. D. of C. 1950)	8
Slattery v. Marra Bros., Inc., 186 F. (2d) 134 (C. C. A. 2d, 1951)	7
Spaulding v Parry Nav. Co., 187 F. (2d) 257 (C. C. A. 2d, 1951)	7
United States v. Rothschild International Stevedoring Co., 183 F. (2d) 181 (C. C. A. 9th, 1950)	6, 7

TABLE OF CONTENTS OF BRIEF.

	Page
Argument	11
I. Contribution as Between Joint Tort Feasors Arising Out of a Maritime Cause of Action Should Be in the Proportion of Fault Determined by the Jury and Not Be Limited by the Extent to Which an Employer Might Otherwise Be Required to Pay Compensation to the Plaintiff	11
(a) The Act Does Not Limit the Amount of Contribution to Be Paid by a Joint Tort Feasor in a Maritime Cause of Action	12
(b) Contribution Should Be in the Proportion of Fault as Found by the Jury and Not in the Proportion of Equal Fault as Decided by the District Court	15
Conclusion	17

TABLE OF CASES CITED IN BRIEF.

	Page
American Mutual Liability Ins. Co. v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950)	12
American Stevedores, Inc. v. Porello, 330 U. S. 446 (1947)	16, 17
Explorer, The, 20 Fed. 135 (C. C. E. D. La. 1884)	16
Garrett v. Moore-McCormack Co., Inc., 317 U. S. 239 (1942)	15
Guerrini v. United States, 167 F. (2d) 352 (C. C. A. 2d, 1948) cert. den. 335 U. S. 843	16
Hitaffer v. Argonne Co., 183 F. (2d) 811 (C. of A. D. of C. 1950) cert. den. 340 U. S. 852	12, 13, 14
Kreste v. United States, 158 F. (2d) 575 (C. C. A. 2nd, 1946)	16
Liberty Mutual Ins. Co. v. Vallendingham, 94 F. Supp. 17 (D. C. D. of C. 1950)	13
Max Morris, The, 137 U. S. 1 (1890)	16
Portel v. United States, 85 F. Supp. 458 (D. C. S. D. N. Y. 1949)	14, 16, 17
Rederii v. Jarka Corporation, 26 F. Supp. 304 (D. C. Me. 1939)	14
Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 431 (1939)	16
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 88 (1946)	15
Slattery v. Marra Bros. Inc., 186 F. (2d) 134 (C. C. A. 2d, 1951)	12
Spaulding v. Parry Nav. Co., 187 F. (2d) 257 (C. C. A. 2d, 1951)	13
S. S. Samovar, The, 72 F. Supp. 574, 588 (D. C. N. D. Cal. 1947)	14
Stokes v. United States, 144 F. (2d) 82 (C. C. A. 2nd, 1944)	16
Tampico, The, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942)	14
United States v. Rothschild International Stevedoring Co., 183 F. (2d) 181 (C. C. A. 9th, 1950)	12, 14

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1950.

No.

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Halcyon Lines and Vinke and Company, owners and operators of the Dutch steamship STAD VLAARDINGEN, respectfully pray that writs of certiorari be issued to review the final judgments of the United States Court of Appeals for the Third Circuit entered on February 21, 1951 in appeals docketed in said Court as No. 10,213 (appeal by the respondent herein) and No. 10,219 (appeal by the petitioners herein) (R. 190, 191), each final judgment reversing the same judgment of the United States District Court for the Eastern District of Pennsylvania (R. 189, 190, 191).

Summary and Statement of Matter Involved.

This is a civil action to recover damages for personal injuries under the general maritime law brought by Salvadore Baccile, an employee of Haenn Ship Ceiling and Refitting Corporation, (hereinafter for the sake of brevity referred to as "Haenn"), against Halcyon Lines and Vinke and Company, (hereinafter for the sake of brevity referred

to as "Halcyon"), the owners and operators of the Dutch Steamship STAD VLAARDINGEN (Rp.* 4, Rr. 6).

The defendants filed a third-party complaint against Haenn, the plaintiff's employer, claiming contribution or indemnity (Rp. 11, Rr. 13).

On November 25, 1946 while the vessel was moored at Girard Point, Philadelphia, Haenn, plaintiff's employer, an independent contractor, was engaged by Halcyon to make repairs to grain fittings in the holds of the vessel which had been installed therein for the carriage of a cargo of grain from Montreal to Rotterdam, at which port she discharged her cargo and sailed in ballast to Philadelphia. The grain fittings had been damaged during the carrying and discharging of the cargo carried from Montreal to Rotterdam (Rp. 22, Rr. 156).

On the day of the accident a representative of plaintiff's employer and the surveyor for the New York Board of Underwriters, as arranged by the ship's agents, attended on board to determine the nature and extent of work required to be done on the grain fittings in order to receive the approval of the surveyor. It was found that the burlap lining on the inside of the grain feeder built in No. 2 hatch had been torn and required replacing (Rp. 22, Rr. 156). In the late afternoon of November 25, 1946, plaintiff and a fellow workman were engaged in the work of replacing the burlap in this feeder and in doing so they entered the feeder from the main deck of the vessel by placing an extension ladder (which, however, was not extended), the property of Haenn, the third-party defendant, on a plank which was running fore and aft in the bottom of the feeder near the 'tween deck. This plank was placed in the feeder by those who built the feeder in Montreal and was used in connection with its construction, but was not a part of the feeder and

* The record in this case consists, inter alia, of the Appendix in the Court-below in the aforesaid Appeal No. 10,219 which Appendix shall hereafter be referred to by the symbols "Rp." and of the Appendix in the Court-below in the aforesaid appeal No. 10,213 which Appendix shall hereafter be referred to by the symbols "Rr.". The symbol "R." shall refer to the record printed subsequent to the aforesaid appendices.

was unnecessary to the purpose of the feeder (Rp. 23, Rr. 157, Rp. 41, Rr. 175, Rp. 44, Rr. 178). While the ladder was resting on the plank, the plaintiff descended it, stepped from the plank onto one of the ship's steel beams and thence again onto the plank to the rear of the ladder and walked on the plank to the end thereof which was against the after part of the feeder. The plank came free of its fastenings; and the ladder resting on it, the plank itself, and the plaintiff fell to the lower hold, a distance of about thirty (30) feet, resulting in serious and permanent injuries to the plaintiff.

On November 21, 1949, the case was called for trial before the Hon. James P. McGranery. Before proceeding to trial, counsel for all of the parties agreed that the plaintiff was entitled to recover $65,000, and, in accordance with stipulation made in open court, a judgment was entered in favor of the plaintiff in that amount.

The case then proceeded to trial on the issue between Halcyon, as third-party plaintiffs, and Haenn, as third-party defendant, as to whether either or both were guilty of negligence causing the plaintiff's injuries. Halcyon contended that Haenn was negligent in not properly inspecting the plank in the bottom of the grain feeder on which the ladder was rested, in performing the work in an unsafe manner when it could have been done by other methods without danger of injury to the plaintiff, and in failing to furnish the necessary safe appliances and equipment with which to perform the work. Haenn contended that it was not negligent and that the representatives of the vessel gave no notice to the plaintiff of the unsafe condition of the plank.

In order to determine these issues, the trial Court submitted to the jury certain interrogatories, the answers to which were to constitute a special verdict (Rp. 38, Rr. 172). In effect, these interrogatories required the jury to answer affirmatively or negatively as to whether either Halcyon or Haenn or both was or were negligent so as to contribute

substantially to the plaintiff's injuries. The jury found that both were negligent.

In response to the interrogatory as to the percentage of negligence of the respective parties, the jury answered that Halcyon was twenty-five per cent. (25%) negligent and Haenn was seventy-five per cent. (75%) negligent (Rp. 38, 39, Rr. 173).

Halcyon thereupon moved the trial court, on the basis of the jury's answers, to enter judgment in favor of Halcyon against Haenn in the sum of $48,750 on which motion the trial Judge reserved action (Rp. 4, Rr. 174). Haenn filed Motions for New Trial and for Judgment N. O. V. and for Molding the Verdict.

On April 3, 1950, after argument, the District Court filed an Opinion and Order dismissing Haenn's Motions for Judgment N. O. V. and for a New Trial and entered judgment in favor of Halcyon against Haenn, in the amount of $32,500, which is fifty per cent. (50%) of the amount paid to the plaintiff by Halcyon in accordance with the stipulation of counsel before the trial (Rp. 46, Rr. 180). Both Halcyon and Haenn appealed to the United States Court of Appeals for the Third Circuit, Haenn in Appeal No. 10,213 because of the judgment against it, and Halcyon in Appeal No. 10,219 because of the action of the District Court in altering the jury's verdict.

Argument was heard on both appeals, and on February 21, 1951, the United States Court of Appeals for the Third Circuit in an opinion by Circuit Judge Kalodner ruled that Haenn was negligent and had a liability over to Halcyon but that such liability was limited to the amount of compensation payable by Haenn to the plaintiff had he elected to receive compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. § 901 et seq.) and accordingly in each of the aforesaid appeals reversed the judgment of the District Court. (R. 189)

Judgment in each appeal was entered on February 21, 1951 (R. 190, 191).

This petition for writs of certiorari is presented to review the aforesaid decision of the United States Court of Appeals in each of the aforesaid appeals.*

Jurisdiction.

The judgments of the United States Court of Appeals for the Third Circuit were each entered on February 21, 1951 (R. 190, 191).

The jurisdiction of this Court to entertain this petition and to grant the same is provided in Section 1254 (1) and Section 2101 (c) of Title 28 of the United States Code and by Rule 38, par. 5 (b) of the Supreme Court of the United States.

Opinions Below.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed April 3, 1950, appears on Rp. 41 to 46, inclusive, and Rr. 175 to 179, inclusive, of the record and is reported in 89 F. Supp. 765. The opinion of Circuit Judge Kalodner of the United States Court of Appeals for the Third Circuit, filed February 21, 1951, appears on R. 183 to 189, inclusive, of the record and is reported in 187 F. (2d) 403.

Questions Presented.

The plaintiff, an employee of an independent contractor who had been engaged to repair grain fittings in a vessel, sued the shipowners and operators in a civil action to recover damages under general maritime law for personal injuries sustained while engaged in making such repairs. The shipowners and operators joined the plaintiff's employer as a third-party defendant alleging that it was either solely liable or liable for contribution to any judgment attained against them by plaintiff. At the trial the jury found by special verdict in respect to interroga-

* Petitioners have been informed that a petition for writs of certiorari is also being filed by Haenn Ship Ceiling and Refitting Corporation.

tories that both were negligent and that the negligence of the shipowners and operators contributed twenty-five per cent. (25%) to the plaintiff's injury and the negligence of the plaintiff's employer contributed seventy-five per cent. (75%) thereto. The District Court then entered judgment in favor of the shipowners and operators for contribution from the plaintiff's employer on the basis of equal fault rather than upon the percentage of fault found by the jury. The United States Court of Appeals for the Third Circuit, reversed this ruling and held that the contribution of the plaintiff's employer was limited to the extent of compensation which would have been payable to the employee under the Longshoremen's and Harbor Workers' Compensation Act.

1. Did not the United States Court of Appeals err in limiting contribution to the extent that compensation would have been payable to the plaintiff by his employer under the Longshoremen's and Harbor Workers' Compensation Act?

2. Did not the District Court err in entering a judgment for contribution on the basis of equal fault rather than the percentage of fault found by the jury?

Reasons for Granting the Petition.

The petition should be granted because:

1. The decision of the United States Court of Appeals for the Third Circuit is in conflict with the decisions of the United States Courts of Appeals for the Second Circuit, for the Ninth Circuit, and for the District of Columbia in the following cases:

American Mutual Liability Ins. Co. v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950);

United States v. Rothschild International Stevedoring Co., 183 F. (2d) 181 (C. C. A. 9th, 1950);

Hitaffer v. Argonne Co., 183 F. (2d) 811 (C. C. A. D. of C. 1950), cert. den. 340 U. S. 852.

In the *American Mutual Liability Ins. Co. v. Matthews, supra,* the shipowner was denied any contribution whatsoever from the longshoreman's employer.

In *United States v. Rothschild International Stevedoring Co., supra,* the shipowner was granted full indemnity against the stevedoring company.

In *Hitaffer v. Argonne Co., supra,* the wife of an employee was permitted to recover damages from her husband's employer for loss of consortium, notwithstanding the payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act.

In the instant case, the contribution payable to the shipowner has been limited to the amount of compensation which the stevedoring company would have been required to pay its employee under the Longshoremen's and Harbor Workers' Compensation Act.

Thus, there are presently existing three distinct and separate views by four different United States Courts of Appeals with respect to the liability of employers to third parties under the Longshoremen's and Harbor Workers' Compensation Act.

This conflict was recognized by the United States Court of Appeals for the Second Circuit in two recent cases. In *Slattery v. Marra Bros. Inc.,* 186 F. (2d) 134 (C. C. A. 2d, 1951) that Court reaffirmed the principle of the *Matthews* case, *supra,* and, after considering the *Rothschild* case, *supra,* stated that it could hardly be reconciled with the *Matthews* case. In *Spaulding v. Parry Nav. Co.,* 187 F. (2d) 257 (C. C. A. 2d, 1951) the same Court again dismissed a third-party complaint for contribution from the plaintiff's employer.*

The present uncertainty of the law in the lower federal courts was further demonstrated in the recent case of

* The shipowner in the latter case has recently filed a petition for certiorari with Your Honorable Court (No. 728, October Term, 1950) in which it claims, among other reasons for granting a writ, that said decision is contra to the instant case.

Liberty Mutual Insurance Co. v. Vallendingham, 94 F. Supp. 17 (D. C. D of C. 1950) in which the District Court for the District of Columbia held (contrary to the implications of *Hitaffer v. Argonne Co., supra*) that the aforesaid Act prevented an employer from being subjected to liability for contribution, and dismissed the third-party complaint for contribution on the authority of the *Matthews* case.

2. The decision of the United States Court of Appeals for the Third Circuit in failing to permit contribution between joint tort feasors arising out of a maritime cause of action in proportion of the fault determined by the jury is contrary to the recent expressions of your Honorable Court in the case of *American Stevedores Inc. v. Porello*, 330 U. S. 446 (1947) in which your Honorable Court indicated a clear recognition of the existence in admiralty of the doctrine of comparative negligence and of the fact that there may be comparative contribution as between joint tort feasors in a case arising out of personal injury.

3. The decision of the United States Court of Appeals for the Third Circuit (assuming, without admitting, that the contribution of the plaintiff's employer cannot be greater than the compensation payments for which it would be liable under the Longshoremen's and Harbor Workers' Compensation Act) fails to set forth any procedure whatsoever whereby the shipowners or operators can liquidate the amount to be recovered from the plaintiff's employer. Furthermore, the ultimate sum to which the employee would be entitled under the Longshoremen's and Harbor Workers' Compensation Act cannot in most cases be determined for a great number of years and, therefore, there can be no certainty or definiteness in arriving at an amount of contribution (assuming that a procedure therefor be established) for which the employer should be responsible.

4. The apparent impracticability of the decision of the Court-below requires not only the review of that decision

but a statement by your Honorable Court setting forth the law to be followed by all federal courts relating to the liability of employers for contribution to joint tort feasors and the procedure for enforcing the same.

It is to the interest both of shipowners and operators and of stevedoring companies (as well as of the maritime trade in general) that these basic and fundamental questions be determined by Your Honorable Court.

Respectfully submitted,

HALCYON LINES AND
VINKE AND COMPANY,
By JOSEPH W. HENDERSON,
Of Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOSEPH W. HENDERSON.

Sworn to and subscribed before me this 17th day of May A. D., 1951.

HARRISON G. KILDARE,
Notary Public.

(Seal)

My commission expires January 25, 1955.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

For Opinions Below, Jurisdiction, Statement of the Case, and Questions Presented see pages 1 to 5 of the Petition.

ARGUMENT.

I. Contribution as Between Joint Tort Feasors Arising Out of a Maritime Cause of Action Should Be in the Proportion of Fault Determined by the Jury and Not Be Limited by the Extent to Which an Employer Might Otherwise Be Required to Pay Compensation to the Plaintiff.

At the trial, the jury, in response to interrogatories, found as a fact that both defendants were negligent and that seventy-five per cent. (75%) of the plaintiff's damages was attributable to his employer, Haenn (Rp. 39, Rr. 173, 174).

On a motion for molding the verdict, the District Court entered judgment against the plaintiff's employer in the amount of $32,500.00, which is fifty per cent. (50%) of the plaintiff's recovery (Rp. 46, Rr. 180).

The United States Court of Appeals for the Third Circuit limited the contribution payable by Haenn to the extent of compensation which Haenn would have been required to pay to the plaintiff under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 et seq. (hereinafter sometimes referred to as the "Act") had the plaintiff not elected to sue the shipowner (R. 183-189).

(a) The Act Does Not Limit the Amount of Contribution to Be Paid by a Joint Tort Feasor in a Maritime Cause of Action.

The United States Court of Appeals for the Third Circuit in this case has taken a legally erroneous position midway between that of the United States Court of Appeals for the Second Circuit, as expressed in *American Mutual Liability Insurance Co. v. Matthews,* 182 F. (2d) 322 (C. C. A. 2d, 1950) and that of the United States Court of Appeals for the Ninth Circuit as expressed in *United States v. Rothschild International Stevedoring Co.,* 183 F. (2d) 181 (C. C. A. 9th, 1950) and of the United States Court of Appeals for the District of Columbia, as expressed in *Hitaffer v. Argonne Co.,* 183 F. (2d) 811 (C. of A. D. of C. 1950) cert. den. 340 U. S. 852.

In *American Mutual Liability Insurance Co. v. Matthews, supra,* it has been held in the Second Circuit that the employer of a plaintiff-longshoresman is not liable for contribution for an injury caused by the mutual fault of his employer and a third party.

In *United States v. Rothschild International Stevedoring Co., supra,* an exactly opposite conclusion was reached. The Court of Appeals for the Ninth Circuit allowed *full* indemnity in favor of the shipowner against the stevedoring company on the ground that its negligence was the active or intervening cause of the plaintiff's injury.

In *Hitaffer v. Argonne Co., supra,* the United States Court of Appeals for the District of Columbia, in a suit by the employer's wife against his employer for loss of consortium, ruled that the Act had no effect upon the common law liability of a stevedore-employer to a third party, even though she be the wife of its employee.

The conflict among the various circuits was recognized by the Second Circuit in the case of *Slatterly v. Marra Bros., Inc.,* 186 F. (2d) 134 (C. C. A. 2d, 1951) in which, after referring to the *Rothschild* case, it held that there

could be no contribution between joint tort feasors when one of them was covered by a state compensation act and that any right of indemnity must exist independently.

See also *Spaulding v. Parry Nav. Co.*, 187 F. (2d) 257 (C. C. A. 2d, 1951) in which the same Court again dismissed a third-party complaint for contribution from the plaintiff's employer and in which case a petition for certiorari has recently been filed with Your Honorable Court (No. 728, October Term, 1950) on the ground, inter alia, that the decision is contrary to the decision in the instant case. Moreover, the rule to be followed in the federal courts has been further confused by the decision of the District Court of the District of Columbia in the case of *Liberty Mutual Insurance Co. v. Valtendingham*, 94 F. Supp. 17 (D. C. D. of C. 1950) which held, notwithstanding the implications of the *Hitaffer* case, *supra*, to the contrary, that the Act prevented an employer from being subjected to liability for contribution.

Circuit Judge Kaufodner in the instant case has properly held that Haenn is liable to Halcyon for contribution notwithstanding the fact that Section 5 of the Act provides that as between employer and employee, "his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer . . . on account of such injury or death" the employer's liability under the Act is exclusive. However, in an apparent desire to fulfil what he terms "the social policy" of the Act, the Court-below, without citing any decision or any provision in the Act, has arbitrarily limited such contribution to the extent of compensation which would otherwise be payable under the Act if the plaintiff had not elected to sue the shipowner. The Court-below conceded "as between the employer and a stranger contributing to the injury of an employee, the Act unquestionably falls short of cover" (R. 186). It also recognizes that "Haenn and Halcyon were, to use the preferable admiralty description, 'mutual wrongdoers,'" and that it would be

inequitable for Halcyon to bear the entire burden merely because Halcyon had the misfortune to injure one within the Act. Nevertheless, the Court below by so-called judicial legislation has limited Halcyon's right of contribution from Haenn without any justification therefor either under the Act or under any decision of this Court or any lower federal court.

Section 5 of the Act, which provides that the liability of an employer shall be exclusive, was enacted for the purpose of making the liability of employer to his employee, or to anyone suing "to recover damages . . . on account of such injury or death", sole and exclusive under the Act; if Congress had intended to include the liability of an employer to a joint tort-feasor, it could have easily done so. The Act is silent as such liability, and in the case where such a third party has sued the employer (as in this case for contribution for a tort caused by their mutual fault for which the jury found that the employer was seventy-five per cent. (75%) responsible) the Act does not proscribe or limit that third person's cause of action. *United States v. Rothschild International Stevedoring Co., supra; Hitaffer v. Argonne Co., supra.* Such third party should, therefore, be entitled to recover contribution without any limitations or restriction from the Act.

Such has also been the holding of various District Courts. *Rederii v. Jarka Corporation,* 26 F. Supp. 304 (D. C. Me. 1939); *The Tampico,* 45 F. Supp. 174 (D. C. W. D. N. Y. 1942); *The S. S. Samovar,* 72 F. Supp. 574, 588 (D. C. N. D. Cal. 1947); *Portel v. United States,* 85 F. Supp. 458, 462 (D. C. S. D. N. Y. 1949).

Finally, the Act itself provides no procedure for determining in advance what in each given case will be the amount of compensation which the stevedore-employer would have ultimately been required to pay if its employee had not elected to sue the third party. In fact, in many cases it will be difficult, and perhaps impossible, to determine such amount for a great number of years. Nor does

the Court-below set forth any procedure to reach the unusual result which it has sought to accomplish in its decision. At best, the determination of such amount is little more than a guess or estimate which might easily be much less than the ultimate amount of liability of the employer under the Act. It seems to us that the Court-below, instead of clarifying the rights and liabilities of joint tort feasors in situations like the instant case, has created further confusion on the subject and has erroneously attempted to establish a rule, unsupported by legislation or case law, which in many cases may be impractical and, in some instances, impossible of application.

(b) Contribution Should Be in the Proportion of Fault as Found by the Jury and Not in the Proportion of Equal Fault as Decided by the District Court.

The only fault attributable to Halcyon is that it failed to inspect and failed to warn Haenn of the alleged defective conditions of the plank. Since Haenn, which specialized in this kind of work, had the free choice of the manner and means of doing it, with no notice to Halcyon of what it intended to do, it is obvious that Haenn's faults are greater in number and are more serious in character.

If the decision of the District Court as to the extent of the contribution be considered as an exercise of discretion in disregarding the jury's finding, this action was an abuse of discretion, and reversible.

It is well established that even though an action be brought at law in a state or in a federal court, admiralty principles will be applied where the cause of action is maritime in character. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 88 (1946); *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942). The accident in the instant case occurred on board a vessel in navigable waters, and, therefore, admiralty principles are to be applied in this case.

The determination of the correctness of the judgment of the District Court, therefore, depends upon whether as a matter of law, contribution between joint tort feasors in admiralty arising out of damages for personal injury can be awarded only for half of the damages.

This is not a *collision* case, and, therefore, the rule as to damages in collision cases is not applicable but rather the rule of damages in personal injury cases.

The precise question in this case has not been considered or decided by Your Honorable Court, but in *American Stevedores, Inc. v. Porello,* 330 U. S. 446, (1947) Your Honorable Court has indicated a clear recognition of the existence in admiralty of the doctrine of comparative negligence and of the fact that there may be comparative contribution as between joint tort feasors in a case arising out of personal injury.

The concept of comparative negligence is found in early cases in admiralty, particularly in personal injury cases, and was expressly recognized by this Court in *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424, 431 (1939). See also *The Explorer* 20 Fed. 135 (C. C. E. D. La. 1884) and *The Max Morris,* 137 U. S. 1 (1890). This doctrine is now firmly imbeded in our admiralty law in cases of personal injury and has been accepted as a well-taken step in the approach toward fairness and justice. *Kreste v. United States,* 158 F. (2d) 575 (C. C. A. 2nd, 1946); *Stokes v. United States,* 144 F. (2d) 82 (C. C. A. 2nd, 1944); *Portel v. United States,* 85 F. Supp. 458 (D. C. S. D. N. Y. 1949); and *Guerrini v. United States,* 167 F. (2d) 352 (C. C. A. 2d, 1948), cert. den. 335 U. S. 843, in which the Court of Appeals in remanding the case for further hearings stated that if liability was found against the defendant, plaintiff's recovery should be reduced to the extent of seventy-five per cent. (75%).

This same consideration applies in situations of contribution between joint tort feasors in a maritime cause of action. The suggestion of contribution by this Court

in the *Porello* case, *supra*, and the award of contribution in *Portel v. United States*, *supra*, is in accord with the principles of admiralty law and should be so applied in the instant case.

The contribution to which Halcyon is entitled in this case is, therefore, seventy-five per cent. (75%) of the judgment paid to the plaintiff, which is the proportion of negligence found by the jury.

Conclusion.

The petitioners' prayer for writs of certiorari should, therefore, be granted.

Respectfully submitted,

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
GEORGE M. BRODHEAD,
Counsel for Petitioners.

Philadelphia, Pa.
May 17, 1951.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 62.

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
GEORGE M. BRODHEAD,
1910 Packard Building,
Philadelphia 2, Pa.,
Counsel for Petitioners.

Paternational, 236 Chestnut St., Phila. 6, Pa.

SUBJECT INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Specification of Errors Intended to Be Urged	5
Questions Presented	6
Argument	7
Summary of Argument	7
I. Contribution as Between Joint Tort Feasors Arising Out of a Maritime Cause of Action Should Be in the Proportion of Fault Determined by the Jury and Not Be Either Reduced to an Equal Division of Damages or Limited to the Extent to Which the Employer-Joint Tort Feasor Might Otherwise Be Required to Pay as Compensation Under the Longshoremen's and Harbor Workers' Compensation Act	7
(a) The Act Does Not Limit the Amount of Contribution to Be Paid by an Employer-Joint Tort Feasor in a Maritime Cause of Action	8
(b) Contribution Should Be in the Proportion of Fault as Found by the Jury at the Trial and Not in the Proportion of Equal Fault as Decided by the District Court	14
Conclusion	23

TABLE OF CASES CITED.

	Page
American Mutual Liability Ins. Co. v. Matthews, 182 F. 2d 322 (C. C. A. 2, 1950)	10
American Stevedores, Inc. v. Porello, 330 U. S. 446 (1947)	18, 19
Chattahoochee, The, 173 U. S. 540, 555 (1899)	12
Coal Operators Cas. Co. v. United States, 76 F. Supp. 681, 683 (D. C. E. D. Pa. 1948)	19
Delaware, The, 161 U. S. 459, 470 (1896)	12
Explorer, The, 20 Fed. 135 (C. C. E. D. La. 1884)	20
Garrett v. Moore-McCormack Co., Inc., 317 U. S. 239 (1942)	14
Guerrini v. United States, 167 F. 2d 352 (C. C. A. 2, 1948) cert. den. 335 U. S. 843	21
Hitaffer v. Argonne Co., 183 F. 2d 811 (C. of A. D. of C. 1950) cert. den. 340 U. S. 852	9, 10
Kreste v. United States, 158 F. 2d 575 (C. C. A. 2, 1946)	22
Liberty Mutual Ins. Co. v. Vallendingham, 94 F. Supp. 17 (D. C. D. of C. 1950)	10
Max Morris, The, 137 U. S. 1 (1890)	20
National Bulk Carriers, Inc. v. United States, 183 F. 2d 405, 410 (C. C. A. 2, 1950)	17
Nogueira v. New York, New Haven & Hartford Railroad Company, 281 U. S. 128, 131 (1930)	11
Parker v. Motor Boat Sales, Inc., 314 U. S. 244, 249 (1941)	11
Portel v. United States, 85 F. Supp. 458 (D. C. S. D. N. Y. 1949)	12, 21, 23
Rederii v. Jarka Corporation, 26 F. Supp. 304 (D. C. Me. 1939)	12

TABLE OF CASES CITED (Continued).

	Page
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 88 (1946)	14
Slattery v. Marra Bros. Inc., 186 F. 2d 134 (C. C. A. 2, 1951)	10
Smith, v. Socony-Vacuum Oil Co., 305 U. S. 424, 431 (1939)	20, 22
South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 255 (1940)	11
Spaulding v. Parry Nav. Co., 187 F. 2d 257 (C. C. A. 2, 1951)	10
S. S. Samovar, The, 72 F. Supp. 574, 588 (D. C. N. D. Cal. 1947)	12
Stokes v. United States, 144 F. 2d 82 (C. C. A. 2, 1944)	22
Tampico, The, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942)	11, 12
United States v. Rothschild International Stevedoring Co., 183 F. 2d 181 (C. C. A. 9th, 1950)	9, 10
Wheeling Corrugating Co. v. McManigal, 41 F. 2d 593, 595 (C. C. A. 4, 1930)	11

TABLE OF STATUTES CITED.

	Page.
Harter Act, Act of February 13, 1893, c. 105; 46 U. C. C. A. §§ 190-195	12
Jones Act, 46 U. S. C. A. § 688	22
Longshoremen's and Harbor Workers' Act, Act of March 4, 1927, c. 509, as amended; 33 U. S. C. A. §§ 901 et seq.	5, 8, 10, 12

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 62.

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

This case comes before the Court on writs of certiorari issued to review final judgments of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed April 3, 1950, appears on R. 175 to 179, inclusive, and R. 221 to 226, inclusive, of the record and is reported in 89 F. Supp. 765. The opinion of Circuit Judge Kalodner of the United States Court of Appeals for the Third Circuit, filed February 21, 1951, appears on R. 229 to 235, inclusive, of the record and is reported in 187 F. 2d 403.

JURISDICTION.

The jurisdiction of this Court to review the final judgments of the United States Court of Appeals for the Third Circuit is provided in Section 1254(1).

The judgments of the United States Court of Appeals for the Third Circuit were each entered on February 21, 1951 (R. 236, 237). Petition for writs of certiorari was granted by this Court on October 8, 1951 (R. 241).

STATEMENT OF THE CASE.

This is a civil action to recover damages for personal injuries under the general maritime law brought by Salvadore Baccile, an employee of Haenn Ship Ceiling and Refitting Corporation, (hereinafter for the sake of brevity referred to as "Haenn"), against Halcyon Lines and Vinke and Company, (hereinafter for the sake of brevity referred to as "Halcyon"), the owners and operators of the Dutch Steamship STAD VLAARDINGEN (R. 6-9, 184-187).

The defendants filed a third-party complaint against Haenn, the plaintiff's employer, claiming contribution or indemnity (R. 13-15, 191-193).

On November 25, 1946, while the vessel was moored at Girard Point, Philadelphia, Haenn, plaintiff's employer, an independent contractor, was engaged by Halcyon to make repairs to grain fittings in the holds of the vessel which had been installed therein for the carriage of a cargo of grain from Montreal to Rotterdam, at which port she discharged her cargo and sailed in ballast to Philadelphia. The grain fittings had been damaged during the carrying and discharging of the cargo carried from Montreal to Rotterdam (R. 156, 202).

On the day of the accident a representative of plaintiff's employer and the surveyor for the New York Board of Underwriters, as arranged by the ship's agents, attended on board to determine the nature and extent of work required to be done on the grain fittings in order to receive the

approval of the surveyor. It was found that the burlap lining on the inside of the grain feeder built in No. 2 hatch had been torn and required replacing (R. 156, 202). In the late afternoon of November 25, 1946, plaintiff and a fellow workman were engaged in the work of replacing the burlap in this feeder and in doing this work the feeder was entered from the main deck of the vessel by placing an extension ladder (which, however, was not extended), the property of Haenn, the third-party defendant, on a plank which was running fore and aft in the bottom of the feeder near the 'tween deck. This plank was placed in the feeder by those who built the feeder in Montreal and was used in connection with its construction, but was not a part of the feeder and was unnecessary to the purpose of the feeder (R. 157, 175, 178, 203, 221, 224). While the ladder was resting on the plank, the plaintiff descended it, stepped from the plank onto one of the ship's steel beams and thence again onto the plank to the rear of the ladder and walked on the plank to the end thereof which was against the after part of the feeder. The plank came free of its fastenings; and the ladder resting on it, the plank itself, and the plaintiff fell to the lower hold, a distance of about thirty (30) feet, resulting in serious and permanent injuries to the plaintiff.

On November 21, 1949, the case was called for trial before the Hon. James P. McGranery. Before proceeding to trial, counsel for all of the parties agreed that the plaintiff was entitled to recover $65,000, and, in accordance with stipulation made in open court, a judgment was entered in favor of the plaintiff in that amount (R. 3).

The case then proceeded to trial on the issue between Halcyon, as third-party plaintiff, and Haenn, as third-party defendant, as to whether either or both were guilty of negligence causing the plaintiff's injuries. Halcyon contended that Haenn was negligent in not properly inspecting the plank in the bottom of the grain feeder on which the ladder was rested, in performing the work in an unsafe manner when it could have been done by other methods

without danger of injury to the plaintiff, and in failing to furnish the necessary safe appliances and equipment with which to perform the work. Haenn contended that it was not negligent and that the representatives of the vessel gave no notice to the plaintiff of the unsafe condition of the plank.

In order to determine these issues, the trial Court submitted to the jury certain interrogatories, the answers to which were to constitute a special verdict (R. 172, 218). In effect, these interrogatories required the jury to answer affirmatively or negatively as to whether either Halcyon or Haenn or both was or were negligent so as to contribute substantially to the plaintiff's injuries. The jury found that both were negligent (R. 173, 219).

In response to the interrogatory as to the percentage of negligence of the respective parties, the jury answered that Halcyon was twenty-five per cent. (25%) negligent and Haenn was seventy-five per cent. (75%) negligent (R. 173, 219).

Halcyon thereupon moved the trial court, on the basis of the jury's answers, to enter judgment in favor of Halcyon against Haenn in the sum of $48,750 on which motion the trial Judge reserved action (R. 174, 220). Haenn filed Motions for New Trial and for Judgment N. O. V. and for Molding the Verdict (R. 3, 182).

On April 3, 1950, after argument, the District Court filed an Opinion and Order dismissing Haenn's Motions for Judgment N. O. V. and for a New Trial and entered judgment in favor of Halcyon against Haenn, in the amount of $32,500, which is fifty per cent. (50%) of the amount paid to the plaintiff by Halcyon in accordance with the stipulation of counsel before the trial (R. 180, 226). Both Halcyon and Haenn appealed to the United States Court of Appeals for the Third Circuit, Haenn in Appeal No. 10,213 because of the judgment against it, and Halcyon in Appeal No. 10,219 because of the action of the District Court in altering the jury's verdict.

Argument was heard on both appeals, and on February 21, 1951, the United States Court of Appeals for the Third Circuit in an opinion by Circuit Judge Kalodner ruled that Haenn was negligent and had a liability to contribute to Halcyon but that such liability was limited to the amount of compensation payable by Haenn to the plaintiff had he elected to receive compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. § 901 et seq.) and accordingly in each of the aforesaid appeals reversed the judgment of the District Court (R. 235).

Judgment in each appeal was entered on February 21, 1951 (R. 236, 237).

Petition for writs of certiorari was filed by Halcyon on May 18, 1951 and granted by this Court on October 8, 1951 (R. 241). Petition for writs of certiorari was also filed by Haenn on July 20, 1951 and granted by this Court on October 8, 1951 (R. 241).

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The petitioner intends to urge the following assigned errors:

1. Those errors relating to the question of the right of the United States Court of Appeals in limiting contribution to the extent that compensation would have been payable to the plaintiff by his employer under the Longshoremen's and Harbor Workers' Compensation Act, i.e., Question No. 1 in petitioners' Petition for Writs of Certiorari.

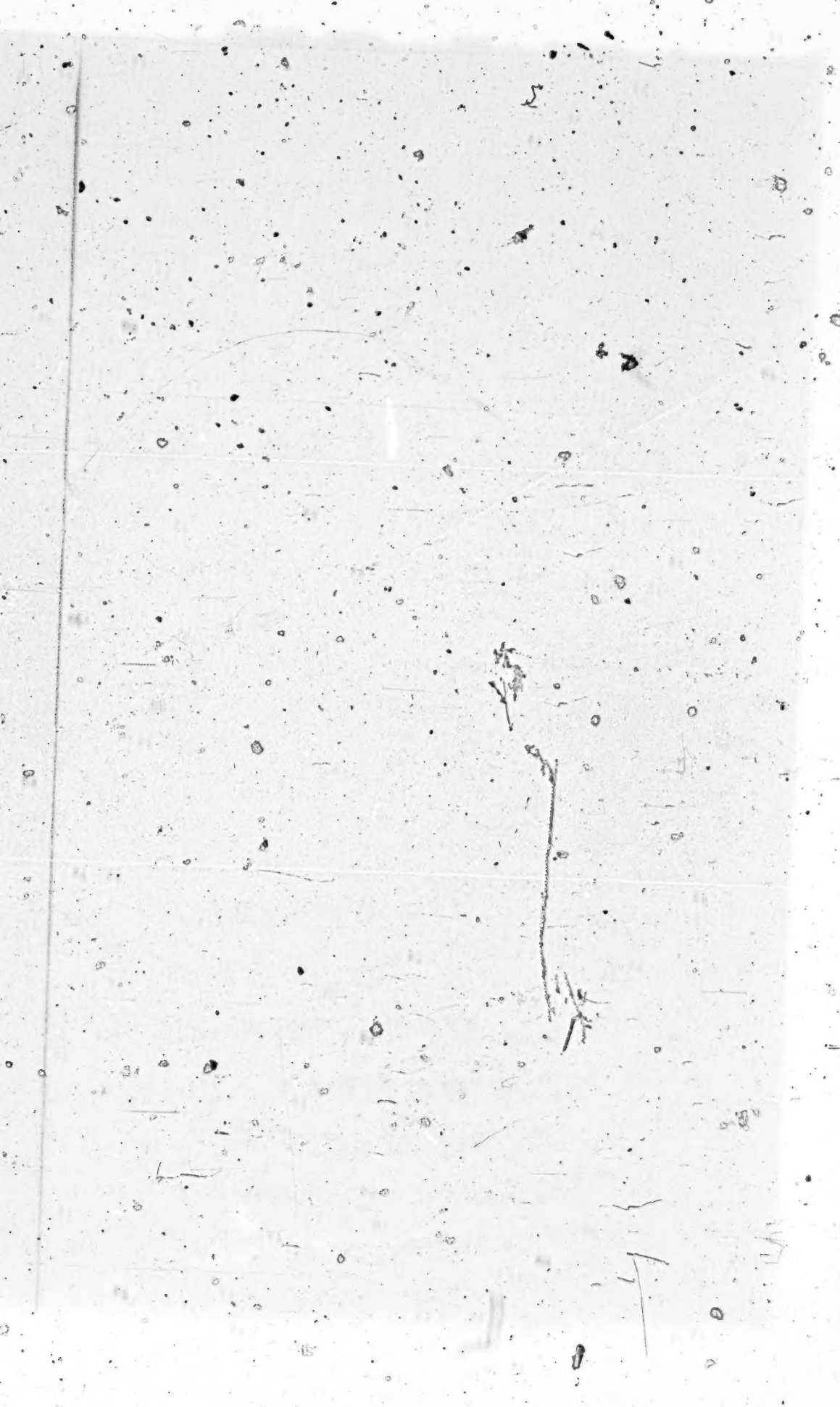
2. Those errors relating to the question of the right in this case for the United States District Court to have entered judgment for contribution on the basis of equal fault rather than the percentage of fault found by the jury, i.e., Question No. 2 in petitioners' Petition for Writs of Certiorari.

QUESTIONS PRESENTED.

The plaintiff, an employee of an independent contractor who had been engaged to repair grain fittings in a vessel, sued the shipowners and operators in a civil action to recover damages under general maritime law for personal injuries sustained while engaged in making such repairs. The shipowners and operators joined the plaintiff's employer as a third-party defendant alleging that it was either solely liable or liable for contribution to any judgment obtained against them by plaintiff. At the trial the jury found by special verdict in response to interrogatories that both were negligent and that the negligence of the shipowners and operators contributed twenty-five per cent. (25%) to the plaintiff's injury and the negligence of the plaintiff's employer contributed seventy-five per cent. (75%) thereto. The District Court then entered judgment in favor of the shipowners and operators for contribution from the plaintiff's employer on the basis of equal fault rather than upon the percentage of fault found by the jury. The United States Court of Appeals for the Third Circuit reversed this ruling and held that the contribution of the plaintiff's employer was limited to the extent of compensation which would have been payable to the employee under the Longshoremen's and Harbor Workers' Compensation Act.

1. Did not the United States Court of Appeals err in limiting contribution to the extent that compensation would have been payable to the plaintiff by his employer under the Longshoremen's and Harbor Workers' Compensation Act?

2. Did not the District Court err in entering a judgment for contribution on the basis of equal fault rather than the percentage of fault found by the jury?



Argument.

SUMMARY OF ARGUMENT.

I. Contribution as Between Joint Tort Feasors Arising Out of a Maritime Cause of Action Should Be in the Proportion of Fault Determined by the Jury and Not Be Either Reduced to an Equal Division of Damages or Limited to the Extent to Which the Employer-Joint Tort Feasor Might Otherwise Be Required to Pay as Compensation Under the Longshoremen's and Harbor Workers' Compensation Act.

(a) The Act Does Not Limit the Amount of Contribution to Be Paid by an Employer-Joint Tort Feasor in a Maritime Cause of Action.

(b) Contribution Should Be in the Proportion of Fault as Found by the Jury at the Trial and Not in the Proportion of Equal Fault as Decided by the District Court.

I. CONTRIBUTION AS BETWEEN JOINT TORT FEASORS ARISING OUT OF A MARITIME CAUSE OF ACTION SHOULD BE IN THE PROPORTION OF FAULT DETERMINED BY THE JURY AND NOT BE EITHER REDUCED TO AN EQUAL DIVISION OF DAMAGES OR LIMITED TO THE EXTENT TO WHICH THE EMPLOYER-JOINT TORT FEASOR MIGHT OTHERWISE BE REQUIRED TO PAY COMPENSATION UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

At the trial the jury found that both Halcyon and Haenn were negligent and that each of them caused or substantially contributed to the plaintiff's injury. However, in response to interrogatories the jury also found as a fact that seventy-five per cent. (75%) of the plaintiff's damages

was attributable to Haenn and only twenty-five per cent. (25%)of his damages was attributable to Halcyon (R. 173, 174, 219).

On a motion for molding the verdict, the District Court entered judgment against the plaintiff's employer in the amount of $32,500.00, which is fifty per cent. (50%) of the plaintiff's recovery (R. 180, 226) on the apparent theory that the rule of equal contribution applied, even though the District Court conceded "that 'comparative negligence is not unknown to our maritime law'" (R. 179, 225).

The United States Court of Appeals for the Third Circuit limited the contribution payable by Haenn to the extent of compensation which Haenn would have been required to pay to the plaintiff under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, as amended; 33 U. S. C. A. § 901 et seq. (hereinafter sometimes referred to as the "Act") had the plaintiff not elected to sue the shipowner (R. 229-235).

(a) The Act Does Not Limit the Amount of Contribution to Be Paid by an Employer-Joint Tort Feasor in a Maritime Cause of Action.

(Point No. 1.)

The Longshoremen's and Harbor Workers' Act, 33 U. S. C. A. § 901 et seq. has no application whatsoever in determining whether one of two wrongdoers may have contribution from the other or as to the amount of such contribution.

Both the District Court and the Court of Appeals have properly held that Haenn is liable to Halcyon for contribution and that the Act does not bar such contribution even though Section 5 of the Act provides that *as between employer and employee*, "his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer on account of such injury or death" the employer's liability under the Act is exclusive (R. 177, 223, 231). However, in

an apparent desire to fulfil what is termed "the social policy" of the Act, the Court of Appeals, without citing any decision or any provision in the Act, has arbitrarily limited such contribution to the extent of compensation which would otherwise be payable under the Act if the plaintiff had not elected to sue the shipowner. The Court of Appeals conceded "as between the employer and a stranger contributing to the injury of an employee, the Act unquestionably falls short of cover" (R. 232). It also recognizes that "Haenn and Halcyon were, to use the preferable admiralty description, 'mutual wrongdoers,'" and that it would be inequitable for Halcyon to bear the entire burden merely because Halcyon had the misfortune to injure one within the Act. Nevertheless, the Court of Appeals by so-called judicial legislation has limited Halcyon's right of contribution from Haenn without any justification therefor either under the Act or under any decision of this Court or any lower federal court.

Limitation of the amount of contribution to be paid joint tort feasors was neither within the specific provisions of the Act nor within the spirit or purpose of the Act.

The Act itself does not specifically contain any such limitation nor can such limitation be implied from any of its various provisions. The only section which might be considered to have any bearing on this precise question is Section 5 which provides that the liability of an employer *to his employee or to any one suing "to recover damages . . . on account of such injury or death"* shall be sole and exclusive under the Act.

If Congress had intended to include the liability of an employer to a joint tort feasor, it could easily have done so. But the Act is silent as to such liability. Neither specifically nor inferentially does the Act proscribe or limit the right of a third party to recover contribution from an employer for damages arising out of the mutual fault. *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. C. A. 9, 1950); *Hitaffer v. Argonne*

Co., 183 F. 2d 811 (C. of A. D. C. 1950, cert. den. 340 U. S. 852).*

In *Hitaffer v. Argonne Co., supra*, at 819, the Court said:

"There can be no doubt but that this section is designed to make the employer's liability under this statute exclusive of any other liability either at law or in admiralty *to the injured employee or anyone suing in the employee's right.* But where a third person is

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*As stated in petitioners' Petition for Writs of Certiorari, the decisions of the various United States Courts of Appeals are presently in confusion as to the effect of the Act in situations like the instant case. There are presently existing three distinct and separate views by four different United States Courts of Appeals with respect to the liability of employers to third parties under the Longshoremen's and Harbor Workers' Compensation Act.

In *American Mutual Liability Insurance Co. v. Matthews*, 182 F. 2d 322 (C. C. A. 2, 1950) it has been held in the Second Circuit that the employer of a plaintiff-longshoreman is not liable for contribution for an injury caused by the mutual fault of his employer and a third party.

In *United States v. Rothschild International Stevedoring Co., supra*, an exactly opposite conclusion was reached. The Court of Appeals for the Ninth Circuit allowed *full* indemnity in favor of the shipowner against the stevedoring company on the ground that its negligence was the active or intervening cause of the plaintiff's injury.

In *Hitaffer v. Argonne Co., supra*, the United States Court of Appeals for the District of Columbia, in a suit by the employer's wife against his employer for loss of consortium, ruled that the Act had no effect upon the common law liability of a stevedore-employer to a third party, even though she be the wife of its employee.

The Court-below in this case has taken a position midway between that of the United States Court of Appeals for the Second Circuit, as expressed in *American Mutual Liability Insurance Co. v. Matthews, supra*, and that of the United States Court of Appeals for the Ninth Circuit, as expressed in *United States v. Rothschild International Stevedoring Co., supra*, and of the United States Court of Appeals for the District of Columbia, as expressed in *Hitaffer v. Argonne Co., supra*.

The conflict among the various circuits was recognized by the Second Circuit in the case of *Slatterly v. Marra Bros., Inc.*, 186 F. 2d 134, 139 (C. C. A. 2, 1951) in which, after referring to the *Rothschild* case, it held that there could be no contribution between joint tort feasors when one of them was covered by a state compensation act and that any right of indemnity must exist independently.

See also *Spaulding v. Parry Nav. Co.*, 187 F. 2d 257 (C. C. A. 2, 1951) in which the same Court again dismissed a third-party complaint for contribution from the plaintiff's employer. A petition for certiorari has recently been filed with your Honorable Court in that case (No. 54. October Term, 1951) on the ground, inter alia, that the decision is contrary to the decision in the instant case and action thereon is still pending. Moreover, the rule to be followed in the federal Courts has been further confused by the decision of the District Court of the District of Columbia in the case of *Liberty Mutual Insurance Co. v. Vallendingham*, 94 F. Supp. 17 (D. C. D. of C. 1950) which held, notwithstanding the implications of the *Hitaffer* case, *supra*, to the contrary, that the Act prevented an employer from being subjected to liability for contribution.

suing in his or her own right on account of the breach [of] some independent duty owed them by the employer, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, *the Act does not proscribe the third person's cause of action.* Thus in a case where the employer had secured payment under the Act to the injured employee and the employee thereafter brought an action against the third party, joint tort feasor, that party was allowed to implead the employer in order to get contribution." (Citing *The Tampico*, D. C. N. Y. 1942, 45 F. Supp. 174.) (Italics ours.)

Such a limitation is also foreign to the spirit and purpose of the Act. The fundamental purpose of the Act was to provide a system of compensation to longshoremen and harbor workers injured or killed on navigable waters which could be speedily recovered *by them* irrespective of negligence of the employer or contributory negligence of the employee. *Nogueira v. New York, New Haven & Hartford Railroad Company*, 281 U. S. 128, 131 (1930). Such compensation was based on the theory that industrial accidents, whether due to negligence or not, should be borne by the industry. *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244, 249 (1941); *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 255 (1940); *Wheeling Corrugating Co. v. McManigal*, 41 F. 2d 593, 595 (C. C. A. 4, 1930). However, when two or more members of industry each contribute to injuring an employee of one of the wrongdoers, no valid reason exists to permit the employer-wrongdoer from not bearing (as between the wrongdoers) its share of damages which the employee-plaintiff may recover at law from the other third party-wrongdoer. The third party's liability to the employee is not limited by any compensation act, and it clearly was neither within the spirit nor within the purpose of the Act to limit the employer's liability for compensation merely because as between employer and employee the Act

had limited the employer's liability to the payment of compensation under the Act.

A third party should, therefore, be entitled to recover contribution without any limitations or restrictions read into the Act by so-called judicial legislation.

Such had also been the holding of various District Courts. *Rederii v. Jarka Corporation*, 26 F. Supp. 304 (D. C. Me. 1939); *The Tampico*, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942); *The S. S. Samovar*, 72 F. Supp. 574, 588 (D. C. N. D. Cal. 1947); *Portel v. United States*, 85 F. Supp. 458, 462 (D. C. S. D. N. Y. 1949).

An analogous situation was presented by the enactment of the Harter Act (Act of February 13, 1893, c. 105; 46 U. S. C. A. §§ 190-195) which, inter alia, relieved a vessel of liability for losses from faults or errors in navigation if due diligence had been observed in making the ship seaworthy. Notwithstanding this exemption from direct responsibility of the vessel to cargo, a non-carrying vessel (which has been in collision with the carrier) may recover in part from the carrier for the damages previously recovered from the non-carrying vessel by the cargo. *The Chattahoochee*, 173 U. S. 540, 555 (1899). Similarly in *The Delaware*, 161 U. S. 459, 470 (1896) (where no question of cargo was involved) the owner of The Delaware had contended that the Harter Act absolved him from liability to another ship for collision damage which had resulted from negligent operation. The Court rejected such a construction of the Harter Act on the ground that legislative history showed that the Harter Act was intended to be applied only as between the carrier and cargo and had nothing to do with liability between ships. So in this case is the Longshoremen's and Harbor Workers' Act concerned only with the liability between employer and employee and has nothing to do with liability for contribution between joint tort feasors.

Finally (assuming, without admitting, that the Act does restrict or limit the amount of contribution between two tort feasors) neither the Act nor the Court below by

its judicial legislation has provided any procedure for determining in advance what in each given case will be the amount of compensation which the stevedore-employer would have ultimately been required to pay if its employee had not elected to sue the third party. In fact, in many cases it will be difficult, and perhaps impossible, to determine such amount for a great number of years.

No one can tell at the time of trial what an employee may be entitled to receive under the Act. It is impossible for anyone to determine *in advance* when an employee's disability will be changed or modified or will finally cease; yet an employer's liability under the Act is dependent, *inter alia*, upon these facts. Did Congress intend by the Act to substitute the Court or a jury in a civil action to make *in advance* findings of fact which it specifically provided in the Act should be found by the Deputy Commissioner? What is the method of appeal or review with respect to a finding of the kind contemplated in the instant case by the Court-below? Should the case be certified to the Deputy Commissioner for review or for separate findings or should they be reviewed as other causes of action are reviewed? What effect has the death of the plaintiff upon the amount to be contributed by the employer-tort feasor? Further consideration will bring to mind many other difficult and perplexing questions the determination of which in some instances will be impossible and in other instances will be at the best no more than a guess or estimate.

Obviously, the Court of Appeals in attempting to extend what it calls "the social policy" of the Act has created further confusion instead of clarifying the rights and liabilities of joint tort feasors in situations like the instant case and has erroneously attempted to establish a rule, unsupported by legislation or decision, which in many cases may be impractical and, in some instances, impossible of application.

(b) Contribution Should Be in the Proportion of Fault as Found by the Jury and Not in the Proportion of Equal Fault as Decided by the District Court.

(Point No. 2.)

The only fault attributable to Halcyon is that it failed to inspect and failed to warn Haenn of the alleged defective conditions of the plank. Since Haenn, which specialized in this kind of work, had the free choice of the manner and means of doing it, with no notice to Halcyon of what it intended to do, it is obvious that Haenn's faults are greater in number and are more serious in character.

Is it mandatory upon the Court or within its discretion —after a jury has found that one of the two wrongdoers was responsible for the accident to the extent of seventy-five per cent. (75%) of the plaintiff's damages—to set aside and disregard such findings (supported by substantial evidence) and to rule, as a matter of law, that contribution in admiralty shall always be in the proportion of equal fault as between wrongdoers whose negligence caused the plaintiff's personal injury?

The accident in this case occurred aboard the S. S. Stad Vlaaringen while she was in navigable waters (R. 13 and 17, Par. 4). It is well settled that such a cause of action is maritime in character and that admiralty principles will be applied, irrespective of whether the action be brought at law in a state court or in a federal court. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 88 (1946); *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942).

This principle was recognized by the District Court, and we think there can be no doubt as to its correctness and applicability to this case (R. 179, 225).

The District Court also recognized that comparative negligence was also a part of the admiralty law (R. 179, 225), but, without citing any basis for its ruling, the Court said that it was "constrained, in the circumstances of this

case, to abide by the general admiralty rule of equal contribution" (R. 179, 225).

It is difficult to determine exactly whether the District Court was following what it conceded to be the admiralty rule of equal contribution because of the fact that such was the rule, or whether "in the circumstances" it was exercising its discretion in rejecting comparative contribution. If the latter, we submit that there was an abuse of discretion because the circumstances of this case furnish no basis for not awarding comparative contribution, if that were legally permissible. The parties had submitted the question of their respective faults to the jury and their finding is fully supported by the evidence. Interrogatories were submitted to the jury for the express purpose of obtaining their appraisal of fault, and there is no reason why it should be rejected in favor of a substitute finding by the trial Judge.

Certainly the facts present no unusual "circumstances" requiring the discard of the jury's appraisal of fault. Haenn was an independent contractor and had complete control over its employees who had possession of the part of the vessel where the work was being done and who chose the means and method of doing it. The salient facts showing fault on the part of Haenn are summarized by the District Court, as follows:

> "Within the number 2 feeder there was a stage planking, about 10 inches wide, supported on cleats nailed to opposite bulkheads of the feeder, at a height of about 30 feet above the bottom of the hold. It appeared from the evidence that this planking had been built and left by the stevedoring company which had installed the feeders. The plaintiff Baccile, one of the carpenters Haenn had sent to work on the ship, and his foreman proceeded to the number 2 feeder with a ladder, part of Haenn's equipment, and lowered it onto the planking. They tapped the planking with the bottom rung of the ladder, in an effort to 'sound' for

cracks and test for sturdiness. Baccile then climbed down the ladder to the staging, the ladder meanwhile resting on the plank, unsecured at the top except for the foreman's hold on it." ((R. 175, 221)

* * *

"Apparently the third-party defendant assumes that the only negligence which could have been found by the jury was based upon Haenn's failure to make an inspection of the condition of the cleats supporting the plank. Because there was no evidence that such an inspection would have disclosed a defect, it is urged that there was no duty to inspect. See Bruszewski v. Isthmian S. S. Co., 163 F. 2d 720. However, the record discloses other evidence from which the jury might properly have found that Haenn did not perform the work in a reasonably safe manner, under the Court's instruction, by undertaking to do the work in the manner in which it did, at a height of some thirty feet above the bottom of the vessel. Particularly pertinent in this connection is the testimony of the master of the vessel as to how, in his expert opinion, the work should have been performed, by the use of a Jacob's ladder or lashed hatch boards; the testimony of the boatswain Westerhoff that he performed a similar operation (cleaning the grain feeder) by lowering himself into the feeder with a rope ladder and using a hatch cover to stand on; and the testimony of the Chief Surveyor for the Board of Underwriters of New York and Philadelphia that the stage planking served no useful purpose in connection with the grain feeder, but was merely put in for the convenience of the grain fitter in erecting the fittings." (R. 177-178, 223-224)

The only fault attributable to Halcyon is that it failed to inspect and failed to warn Haenn of the alleged defective conditions of the plank. Considering the fact that Haenn which specialized in this kind of work and had the free

choice of the manner and means of doing it, with no notice to Halcyon of what it intended to do, it is obvious that Haenn's faults are greater in number and are more serious in character.

If the decision of the District Court as to the extent of the contribution be considered as an exercise of discretion in disregarding the jury's finding, we submit, in consideration of the foregoing, that this was an abuse of discretion.

The determination of the correctness of the judgment of the District Court depends upon whether, as a matter of law, contribution between joint tortfeasors in admiralty arising out of damages for personal injury can be awarded *only* for *half* of the damages.

It is conceded that in *collision* cases the established rule in this country is that contribution in admiralty is in equal shares regardless of the respective degrees of fault.

Even the admiralty rule of half damages in collision cases is regarded by some as being antiquated in the world of today. This rule was inherited from the English, and our courts have doggedly adhered to it although England has abandoned it in favor of proportionate damages based upon comparative fault since 1913 when it ratified the Brussels Convention of 1910. All of the major powers of the world, with the exception of the United States, are signatories or adherents to that Convention.

In the recent case of *National Bulk Carriers, Inc. v. United States*, 183 F. 2d 405, 410 (C. C. A. 2, 1950), in a dissenting opinion, Judge Learned Hand, referring to the half damage rule, said:

> "I do not mean that I should divide the damages equally, if I were free to divide them proportionately to the relative fault of the vessels. An equal division in this case would be plainly unjust; they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all

civilized nations. Indeed, the doctrine that a court should not look too jealously at the navigation of one vessel, when the faults of the other are glaring, is in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits. Nevertheless, so long as our antiquated doctrine prevails, I think we should apply it unflinchingly, and in the case at bar I would divide the damages."

But this is not a collision case, and the doctrine of equal division of damages should not be considered in determining the extent of contribution as between joint tortfeasors in a case of personal injury.

We can find no decision of your Honorable Court where the precise question was considered or decided. However, in *American Stevedores, Inc. v. Porello*, 330 U. S. 446 (1947), this Court has indicated a clear recognition of the existence in admiralty of the doctrine of comparative negligence and that there may be comparative contribution as between joint tortfeasors in a case arising out of personal injury.

In the *Porello* case the question involved was whether a stevedore was required under the indemnity provision in a stevedoring contract with the government to indemnify the government and, if so, to what extent, against a claim for personal injuries by one of the stevedore's employees. This Court held that the contract was not sufficiently specific to determine that question and remanded the case to the district court to determine the meaning of the contract, recognizing the possibility that the contract might be inapplicable to the facts of the case, in which event this Court stated that the district court would be free to adjudge the responsibility of the parties to the contract under the applicable rules of admiralty law. Before reaching this conclusion this Court in an opinion by Mr. Justice Reed stated on page 458:

"Finally, the parties may have intended that American, in case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault. Although the usual rule in admiralty, in the absence of contract, is for each joint tortfeasor to pay the injured party a moiety of the damages, *The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *Barbarino v. Stanhope S. S. Co.*, 151 F. 2d 553, we do not believe that the last alternative, which provides for a measure of comparative negligence, is necessarily beyond the intent of the parties. *Comparative negligence is not unknown to our maritime law. The Max Morris*, 137 U. S. 1; *The Henry S. Grove*, 22 F. 2d 444; see Robinson on Admiralty, p. 91. From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law." (Emphasis supplied.)

While it may be contended that the *Porello* case does not definitely hold that comparative negligence is to be applied and that the above quoted language is dictum, we think that this is not so as the case was remanded to the district court to determine whether the contract applied and, if not, to make such decision as was proper in accordance with principles of admiralty law, having already observed that comparative negligence was not unknown to admiralty law. The contention that the decision of this Court is dictum is fully answered by the opinion of Judge Kirkpatrick in *Coal Operators Cas. Co. v. United States*, 76 F. Supp., 681, 683 (D. C. E. D. Pa. 1948), as follows:

"Now what the Supreme Court said was not di
tum. The Supreme Court was remanding the case
the District Court with instructions and in the senten
quoted was telling the District Judge that, absent t
contract of indemnity, he would be free to apply t
admiralty rule of contribution. The Circuit Court
Appeals had squarely ruled that there could be no co
tribution and the Supreme Court, although it did n
mention the position of the Circuit Court of Appeal
certainly must have intended to overrule it."

In that case Judge Kirkpatrick further stated: (p. 683

"Contribution between joint tortfeasors in ad
miralty is usually to the extent of one-half of the awar
although it may be that the Court may fix the respon
sibility in some other proportion."

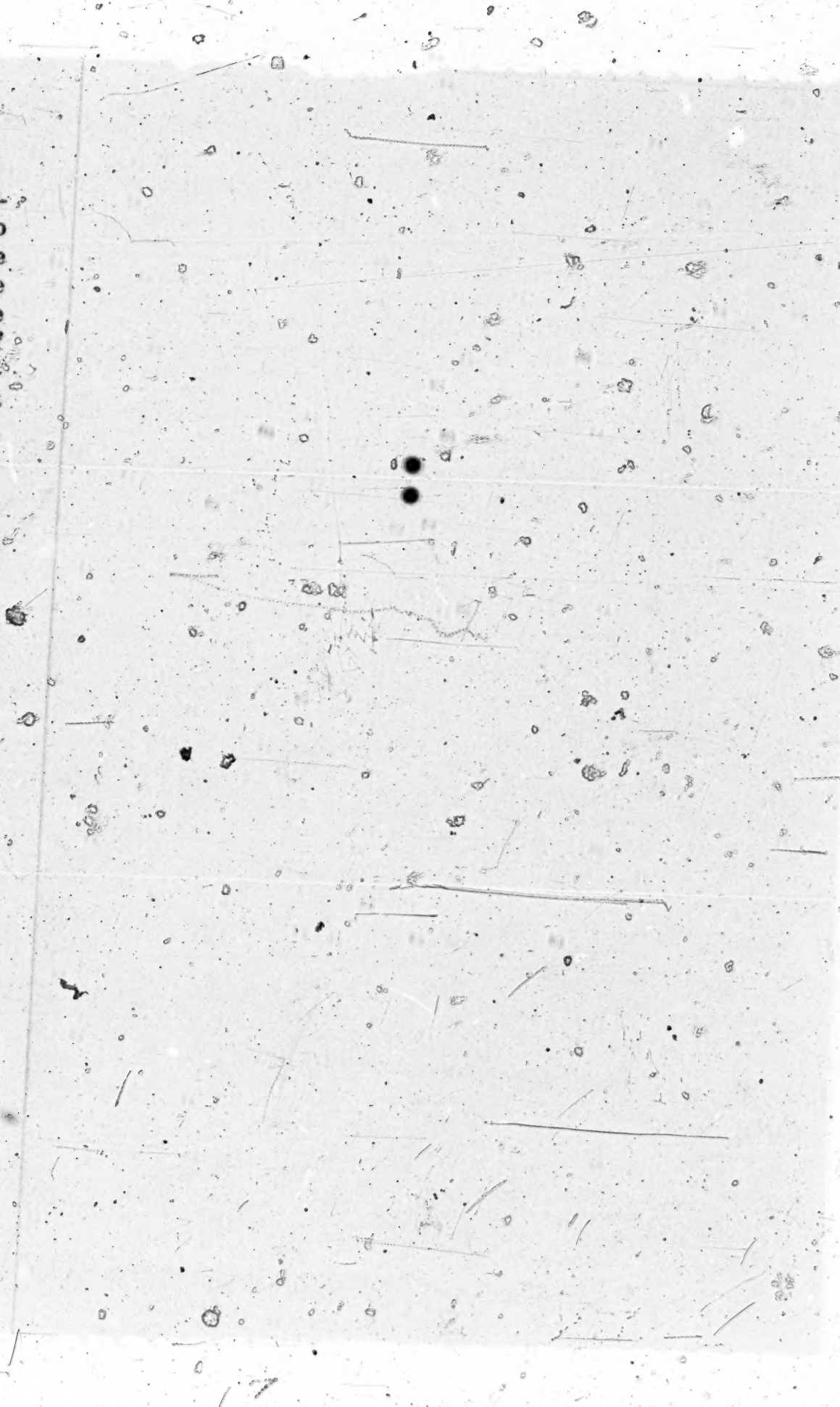
The idea of comparative negligence is found in early cases in admiralty, particularly in personal injury cases. It was expressly recognized by this Court in *Smith v. Socony-Vacuum Oil Co.*, 305 U. S. 424, 431 (1939).

In *The Explorer*, 20 Fed. 135 (C. C. E. D. La. 1884), the Court, after discussing the negligence of the claimant, said (page 139):

"However, from all the authorities examined, I am disposed to hold that in cases of marine torts it is the rule of the courts of admiralty to exercise 'a conscientious discretion and give or withhold damages upon enlarged principles of justice and equity.'"

In that case the Court's award was for only part of the claim, the court stating that it would not be consistent with enlarged principles of justice and equity to award the claimant anything for damages and thus reward his negligence. It did not divide the damages in half.

In *The Max Morris*, 137 U. S. 1 (1890), this Court said that contributory negligence in a case such as the one then before it should not wholly bar recovery. This Court did not settle the method of division of damages but stated:



"Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it" (p. 15).

The Court affirmed the award to the injured sailor of his wages for the period of disability and the denial of any sum for pain and suffering.

Recently in an opinion by Judge Learned Hand in *Guerrini v. United States*, 167 F. 2d 352 (C. C. A. 2, 1948, cert. den. 335 U. S. 843), the Court of Appeals for the Second Circuit remanded the case to the district court for further findings but stated that if liability was found against the defendant, the plaintiff's recovery should be reduced to the extent of 75%.

In the case of *Portel v. United States*, 85 F. Supp. 458 (D. C. S. D. N. Y. 1949), the facts were very similar to those here. In that case the plaintiff was injured as a result partly of his own negligence and partly because of the negligence of the vessel and of his employer, who was an independent contractor performing repair work on the ship's machinery. In that case the Court held that plaintiff's recovery should be reduced by 25% and that the vessel should bear 40% of the loss and his employer 60%. The Court in that case stated (p. 462):

"Although contribution among joint tort-feasors is usually to the extent of one-half the award, the court may fix the responsibility in accordance with the proportion which the fault of each bore to the total fault. See American Stevedores v. Porello, 330 U. S. 446, 458, 67 S. Ct. 847, 91 L. Ed. 1011, and cases therein cited."

The *Portel* case has not been appealed, notwithstanding (according to advices to us by one of the attorneys in the case) that the court on application refused to revise its

findings as to the extent of contribution between the two defendants.

In *Kreste v. United States*, 158 F. 2d 575 (C. C. A. 2, 1946) in a suit by a longshoreman for personal injuries against the owner of a vessel the Court of Appeals reversed the judgment for the libellant and remanded with directions to make specific finding as to the extent of the libellant's negligence in order that the damages could be apportioned.

In *Stokes v. United States*, 144 F. 2d 82 (C. C. A. 2, 1944) the Court of Appeals stated that a division of damages on a 30%-70% basis would not be considered erroneous, although it reversed because the evidence of record did not show that the libellant was negligent in any particular.

It is clear from the foregoing authorities that in personal injury cases the half damage rule in collision cases is not applied, but that the damages are apportioned according to the degree of fault.

This is in accordance with the legislative policy of this country. The Jones Act (46 U. S. C. A. § 688) has specifically brought into the admiralty the provisions of the Federal Employers Liability Act, which recognizes that there may be varying degrees of fault and provides that the negligence of the claimant shall not bar recovery but only may be considered in mitigation of damages. *Smith v. Socony-Vacuum Oil Co.*, 305 U. S. 424 (1939).

The Congress has recognized that there may be varying degrees of fault and has not provided for a denial of recovery to the plaintiff because of his negligence, nor has it specified that should the plaintiff be negligent his recovery should be cut in half. If, in the same case, two defendants are found to be negligent and liable to the plaintiff and it appears that their negligence is in widely varying degrees, then as between them there is no logic in saying that automatically they shall each be responsible for one-half, because the jury can as well apportion the amount of contribution commensurate with the fault of both defendants, as it could in reducing a plaintiff's recovery by reason

of his own fault. In both instances we are approaching as nearly as possible exact justice.

From the foregoing it is, therefore, clear that the doctrine of comparative negligence is now firmly imbedded in our admiralty law in cases of personal injury. It has been adopted as a proper approach toward fairness and justice. The same approach should apply in situations of contribution between joint tort feasors. Contribution on a comparative basis was suggested by this Court in the *Porello* case *supra*, and was awarded in *Portel v. United States*, *supra*, in consonance with existing principles of admiralty law.

CONCLUSION.

We, therefore, submit that the judgments in the Courts below should be reversed and the case remanded with directions to enter judgment in favor of Halcyon and against Haenn in the sum of $48,750.00, with interest and costs, being the proportionate amount of damages which the jury found was caused by the negligence of Haenn.

Respectfully submitted,

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
GEORGE M. BRODHEAD,
Counsel for Petitioners.

Office-Supreme Court, U. S.
FILED
JUN 30 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 62

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

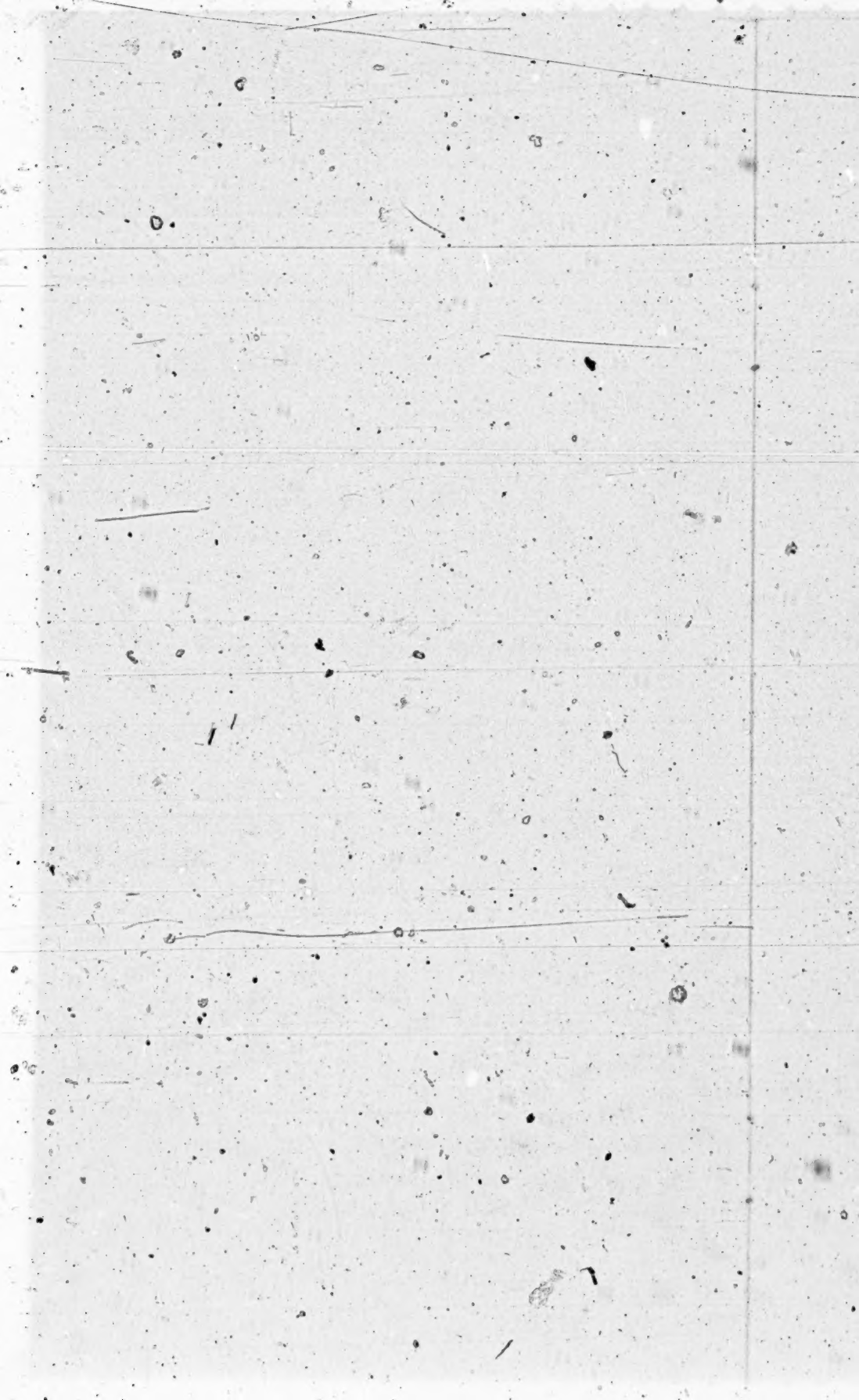
vs.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent

MEMORANDUM FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

THOMAS E. BYRNE, JR.,
225 South 15th Street,
Philadelphia 2, Penna.,
Counsel for Respondent.

JOHN T. PHILLIPS,
EDWARD J. MINGEY,
Of Counsel.



INDEX

Subject Index

	Page
Memorandum for respondent on petition for writ of certiorari	1
There is no conflict between the decision of the Court below and the language of this Court in *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446	2
The formula for contribution framed by the Court below suggests no machinery for liquidating the amount of contribution and is generally unworkable under existing statutes	2
There is conflict among the Circuits	3
Conclusion	4

Table of Cases Cited

American Mutual Liability Insurance Co. v. *Matthews*, 182 F. (2d) 322	3
American Stevedores, Inc. v. *Porello*, 330 U. S. 446	2
Maio v. *Fahs*, 339 Pa. 180	1, 3
United States v. *Rothschild International Stevedoring Co.*, 183 F. (2d) 181	4

Statutes Cited

Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 1300, et seq.)	2, 3
Pennsylvania Compensation Act (77 Purdon's Statutes 411 et seq.)	3
United States Code Annotated, Title 30, Section 1300 et seq.	2, 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 62

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent

MEMORANDUM FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is not a brief in opposition to the petition requesting that certiorari be granted. We would file no brief if it were not for the fact that our failure to do so might be construed as concurrence with some of the points and arguments made in the petition.

In support of the petition three points are alleged. They are:

A. There is conflict between the decision of the Court below and the language of this Court in *American Stevedores, Inc.* v. *Porello,* 330 U.S. 446. (Petition, page 8, paragraph 2)

B. The formula for contribution framed by the Court below suggests no machinery for liquidating the amount of contribution and is generally unworkable under the existing statute, 33 U.S.C.A. 1300 et seq.

C. There is conflict among the Circuits.

We will comment on these points briefly.

A. There Is No Conflict Between the Decision of the Court Below and the Language of This Court in American Stevedores, Inc. v. Porello, 330 U. S. 446.

There is no conflict between the decision below and the language of this Court in *American Stevedores, Inc.* v. *Porello, supra.* In the *Porello* case this Court was discussing the interpretation of a contract. We agree that a general rule of law may be modified by statute or contract, but that argument has no place in this case where no contractual provision touched the subject and no statute, state or federal, controlled or touched upon it.

B. The Formula for Contribution Framed by the Court Below Suggests No Machinery for Liquidating the Amount of Contribution and Is Generally Unworkable under Existing Statutes.

We fully agree with the statement (Petition, page 8, paragraph 3) that the decision below sets up no procedure for liquidation of the amount due one entitled to contribution from an employer by reason of any injury sustained by one of his employees. In some situations it would be impossible to determine the amount of the employer's contribution. In the remaining situations the Court of Appeals' decision neither prescribes nor suggests any workable rule.

It seems strange that neither the Court below nor the Petitioner mention the fact that what the Court below has

done in the instant case is to apply to Maritime Law and the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 1300 et seq.) the rule which the Pennsylvania Supreme Court, by its decision in *Maio* v. *Fahs*, 339 Pa. 180, has applied to common law actions and the Pennsylvania Compensation Act, 77 Purdon's Statutes 411 et seq.

What may be a workable procedure under the Pennsylvania Compensation Act will not and cannot operate successfully under the Longshoremen's and Harbor Workers' Compensation Act because of the fundamental differences, substantive and procedural, between the two Acts.

C. There Is Conflict Among the Circuits

We concede conflict between the decisions by the Court of Appeals for the Second Circuit and that by the Court of Appeals for the Third Circuit in the instant case. On the *amount* of contribution which may be recovered by an original defendant from his co-defendant, who is also the employer of the plaintiff in a personal injury suit, there is conflict among the Second, Third and Ninth Circuits. We deny that the Ninth Circuit Court of Appeals was dealing with the same problem as were the Court of Appeals for the Third Circuit in the instant case and the Court of Appeals for the Second Circuit in *American Mutual Liability Insurance Company* v. *Matthews*, 182 F. 2nd 322. We respectfully suggest that only the Ninth Circuit actually recognized and decided the real problem which pervades all cases of this type.

The confusion which exists is probably underscored by the conflict within the Third Circuit Court of Appeals on the question of the *amount* of the recovery which may be had against the employer. The Third Circuit says in our case that the employer must respond to the amount of the

workmen's compensation payable, yet Chief Judge Biggs of the Third Circuit sat by special designation in the Court of Appeals for the Ninth Circuit when it decided *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2nd 181. Chief Judge Biggs concurred in the decision holding the employer liable to pay indemnity in an amount which far exceeded its possible liability under the Compensation Act.

We respectfully suggest that the confusion in the lower courts extends further than the confines of the problem presented by the petition herein. We suggest that it results from misapprehension of some of the fundamental concepts of the law of torts. The problem and the confusion cannot be clarified by the simple application of labels such as "joint tort feasor", "liability in solido", or "mutual wrong doers."

Unfortunately it is such "solution by label" which has been adopted by the Courts of Appeal for the Second and Third Circuits.

This Respondent is preparing a cross-petition for certiorari, the time for filing which was extended to July 20, 1951 in an Order signed by Mr. Justice Burton on May 11, 1951.

We suggest that all facets of the problem should be considered together before there are any more lower court decisions attempting to solve an over-all problem on a piecemeal basis.

Conclusion

The Respondent does not oppose the application for a writ of certiorari in this case although it urges that the over-all problem cannot be solved satisfactorily unless this Court will also grant certiorari on the petition of Haenn Ship Ceiling and Refitting Corporation and by its decision in the two cases points out to the lower courts the distinc-

tion between primary and secondary liability based upon the breach of a primary duty and the breach of a duty which is but secondary.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
Counsel for Respondent

JOHN T. PHILLIPS,
EDWARD J. MINGEY,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 62.

HALCYON LINES AND VINKE AND COMPANY,
Petitioner,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

MARK D. ALSPACH,
JOHN B. SHAW,
T. E. BYRNE, JR.,
Counsel for Respondent.

KRUSEN, EVANS AND SHAW,
Of Counsel,

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

	Page
STATEMENT OF THE CASE	1
ARGUMENT	3
Point 1.	3
The Clear and Explicit Wording of the Longshoremen's and Harbor Workers' Compensation Act Is Prima Facie Evidence of the Intent of Congress. § 5 of This Act Was Intended by the Congress to Make the Employer's Liability to Pay Compensation an Absolutely Exclusive Liability	9
Analysis of the Purpose, Scope and Intent of the Harter Act as Compared With the Same Elements of the Longshoremen's and Harbor Workers' Compensation Act Fails to Justify the Analogy to the Collision Cases Involving the Former Act, as Practically the Sole Authority for Limiting the Manifest Intent of Congress in the Latter Act to Provide an Absolutely Exclusive Liability on the Part of an Employer of Longshoremen and Harbor Workers	13
The Only Satisfactory Solution of the Dilemma Presented by the Conflicting Decisions, Without Violating the Manifest Intent of the Congress as Expressed in § 5 of the Longshoremen's Act, Lies in Upholding the Absolutely Exclusive Provisions of § 5 of Said Act, in Accordance With the Decision in American Mutual Liability Ins. Co. v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950)	16

INDEX TO BRIEF (Continued).

Page

Point 2. The Maritime Rule of Contribution Is Equal Division of Damages Where Contribution Is the Remedy 17

Historical Background 18

Halcyon's Argument That Equal Division of Damages Obtains Only in Cases of Collision Is Not Well Founded 20

An Analysis of the Decisional Law on Contribution 23

Assuming Arguendo That the Maritime Law Is Not Division of Damages, Still the Moulding of the Verdict Was Proper ... 27

CONCLUSION 29

TABLE OF CASES CITED.

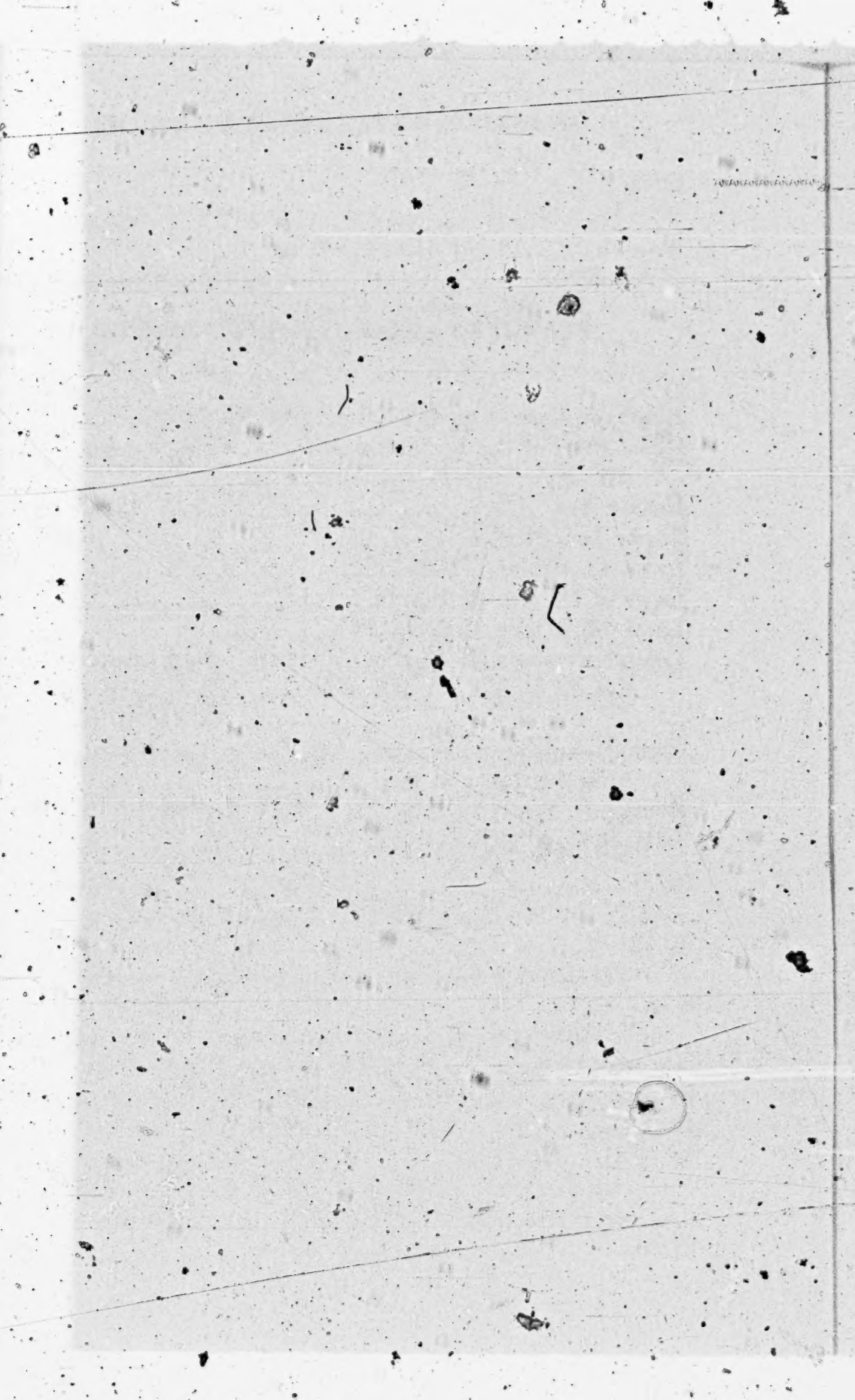
	Page
Aktieselskabet Cuzco v. The Sucarseco, et al., 294 U. S. 394	11, 12, 20
American Mut. Liability Ins. Co. v. Matthews, 182 F. 2nd 322 (CA 2, 1950)	3, 6, 9, 14, 16, 23, 25
American Stevedores Inc. v. Porello, 330 U. S. 446	5, 6, 12, 20, 21, 23
The Arizona v. Anelich 298 U. S. 110	22
Baccile v. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, 187 F. 2nd 403 (CA 3, 1951)	3
Barbarino v. Stanhope S. S. Co., 151 F. (2d) 553 (2 C. C. A., 1945)	12
The Bordentown, 16 F. 270	24
Briggs v. Day, 21 Fed. 727, 730 (S. D. N. Y. 1884)	12
Cataldo v. A/S Glittre, 41 F. Supp. 555 (E. D. N. Y. 1941)	12
The Chattahoochee, 173 U. S. 540 (1899)	12, 20, 24
Erie R. R. Co. v. Erie Transp. Co., 204 U. S. 220 (1907)	12
Erline H. Samuelson Rederii v. Jarka Corporation, 26 F. Supp. 304	11
The Explorer, 20 F. 135	21
The Frank and Willie, 45 F. 494	22
Frusteri v. U. S., 76 F. Supp. 667 (D. C. N. Y.)	3
Garrett v. Moore-McCormack Lines, Inc., 317 U. S. 239	20, 28
The Henry S. Grove, 22 F. 2nd 444	22
Hitaffer v. Argonne Co., 183 F. 2nd 811 (CA D. of C., 1950), cert. den. 340 U. S. 852	3, 4, 6
Holmes v. Oregon & California Ry. Co., 5 F. 523	21
John A. Roebling's Sons Co. of New York v. Erickson, 261 F. 986	22
Johnson v. U. S., 79 F. Supp. 448 (D. C. Oregon)	3
Liberty Mutual Ins. Co. v. Vallendingham, 94 F. Supp. 17 (D. C.)	3
Maio v. Fahs, 339 Pa. 180 (1940)	6

TABLE OF CASES CITED (Continued).

	Page
The Manhasset, 19 F. 430	21
Mason v. The William Murtaugh, 3 F. 404	24
The Max Morris, 137 U. S. 1	21, 22, 25
Miranda v. City of Galveston, 98 F. Supp. 245 (D. C. Tex.)	3
National Bulk Carriers Inc. v. United States, 183 F. (2) 405	18
New York & Porto Rico S. S. Co. v. Lee's Lighters, 48 F. 2nd 372	25
Peterson v. The Chandos, 4 F. 645	21
Phoenix Ins. Co. v. The Atlas, 93 U. S. 302	25
Portel v. United States, 85 F. Supp. 458	17, 22, 23, 24
The Reba, 22 F. 546	24
Rich v. United States, 177 F. 2nd 688	6
The S. S. Samovar, 72 F. Supp. 574 (D. C. N. D. Cal)	12, 25
Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424	22, 28
South Chicago Coal & Dock Co. et al. v. Bassett, 104 F. (2d) 522 (affirmed 309 U. S. 251)	15
Standard Wholesale Phosphate, Etc. v. Ruckert Terminals Corp., 65 A. (2) 304	3
Stokes v. United States, 144 F. 2nd 82	22
Storgard v. France & Canada S. S. Corporation, 263 F. 545	22
The Tampico, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942)	11, 12, 25
United States v. Rothschild International Stevedoring Co., 183 F. 2nd 181 (CA 9, 1950)	3, 4, 6
United States of America v. Rothschild International Stevedoring Company, No. 12,405, United States Court of Appeals for the Ninth Circuit	5
The Wanderer, 20 F. 140	25
The Washington, 76 U. S. 513	24
The Willdomino (C. C. A. N. J. 1924), 300 F. 5, certiorari dismissed (1926) 46 S. Ct. 205, 270 U. S. 641	13

STATUTES AND AUTHORITIES CITED.

	Page
Bispham, Principles of Equity (10th Ed.) p. 27	27
Black Book of the English Admiralty, Volume 4, page 321	19
Harter Act	12, 13, 15, 18
Jones Act, 46 U. S. C. A. 688	20, 22
Laws of Bruges (1350-1380)	19
Laws of Oleron, Article 14	19
Laws of Wisby, Article 26	19
Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. 900 et seq.	1, 3, 8, 9, 10, 11, 13, 14, 15, 16, 17, 19
Pennsylvania Compensation Act, 77 Purdons Statutes Annotated 411 et seq.	6
George C. Sprague, 6 N. Y. U. Law Review 15	19
28 U. S. C. A. 1331 (1)	28



IN THE

Supreme Court of the United States.

October Term, 1951.

No. 62.

HALCYON LINES AND VINKE AND COMPANY,
Petitioner,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The Petitioner sought and obtained certiorari from this Court upon two grounds which we will paraphrase as follows:

I. In an action by a longshoreman-carpenter against a shipowner where the plaintiff's employer was joined as a third-party defendant on a claim of contribution, the Court of Appeals erred in allowing contribution to the extent of the compensation which the employer would have had to pay his employee because both were governed by the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. 900 et seq.

II. The District Court erred in dividing the plaintiff's damages equally (reversed by the Court of Appeals) and should have apportioned them in accordance with percentages of fault as set by the jury.

The Respondent did not oppose allowance of the writs because of its belief that the problems should be settled by this Court *if this Court reaches those problems.* This Respondent is itself the Petitioner in No. 197.

Both parties have set out statements of the facts and to avoid duplication we respectfully refer the Court to the Statement of Facts and Statement of the Case in our brief as Petitioner in No. 197. So far as the Petitioner's Statement of the Case in the present action, No. 62, is concerned, we have no particular quarrel with it. However, we do not accept Petitioner's (Halcyon's) statement of Respondent's (Haenn's) contentions. We certainly urge points other than those mentioned by Halcyon at page 4, line 3 of its brief as Petitioner in the present action.

Argument.

POINT 1.

For brevity we will refer to the original Plaintiff as Baccile, the original Defendant as Halcyon and the Third-Party Defendant as Haenn. We will take up the points in the order in which Halcyon has raised them.

We presume that one of the reasons which induced this Court to grant certiorari in the present case was the conflict among the circuits which Halcyon pointed out in its Petition for Certiorari. We presume further that if this Court reaches the problem at all, it will consider all possible solutions and choose the best.

There are presently four divergent views expressed as follows:

American Mutual Liability Ins. Co. v. Matthews, 182 F. 2nd 322 (CA 2, 1950);

Hitaffer v. Argonne Co., 183 F. 2nd 811 (CA D. of C., 1950), cert. den. 340 U. S. 852;

United States v. Rothschild International Stevedoring Co., 183 F. 2nd 181 (CA 9, 1950); and

Baccile v. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, 187 F. 2nd 403 (CA 3, 1951), the case now before the Court.

The Court of Appeals for the Second Circuit in the *Matthews* case promulgated the rule that the tortfeasor-shipowner could not recover contribution from the employer governed by the Act because of the exclusive liability provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 905.*

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* Many other courts have reached the same result. *Liberty Mutual Ins. Co. v. Vallendingham*, 94 F. Supp. 17 (D. C.); *Standard Wholesale Phosphate Etc. v. Ruckert Terminals Corp.*, 65 A. (2) 304 (Maryland Court construing Federal Act); *Johnson v. U. S.*, 79 F. Supp. 448 (D. C. Oregon); *Frusteri v. U. S.*, 76 F. Supp. 667 (D. C. N. Y.); *Miranda v. City of Galveston*, 98 F. Supp. 245 (D. C. Tex.).

In the *Hitaffer* case the Court of Appeals for the District of Columbia appears to have relied upon Second Circuit decisions prior to the *Matthews* case and at least appears to have believed that it was following the Second Circuit when it pronounced its rule that the tortfeasor could obtain contribution from the employer. We will discuss the real as opposed to the apparent holding of those earlier Second Circuit cases later in this brief.

In the *Rothschild* case the Court of Appeals for the Ninth Circuit allowed full indemnity against the employer. No mention is made in the decision of the effect of § 5 of the Compensation Act and no application for a writ of certiorari was made to this Court. We have obtained the Record or "Apostles on Appeal" from the Clerk of the Court of Appeals for the Ninth Circuit. It discloses that the third-party petition filed by the United States was not printed. That makes it difficult to know whether the claim of the United States for indemnity was predicated upon the general maritime law or upon a written contract. There is, however, a clue which may be helpful. In the Opinion filed by Judge Bowen of the United States District Court for the Western District of Washington, Northern Division, it is stated:

> "That as between Rothschild Stevedoring Company and the United States of America, the former was entitled under the *stevedoring contract* to use the ship's winches supplied for the work by the respondent, United States of America; . . ."[1] (emphasis ours)

Printed in the Apostles as *Respondents' Exhibit A-2* is a long contract entitled

> Addendum to WarShipSteve 4/1/44
> Pacific Northwest and Soucal
> Addendum to Contract No. WSA 4-1487
> DA-WSA 4-420

1. Page 268, Apostles on Appeal, *United States of America v. Rothschild International Stevedoring Company*, No. 12,405, United States Court of Appeals for the Ninth Circuit.

The parties to that contract are the United States and Rothschild International Stevedoring Company.[2]

Pertinent portions of the contract provide:

"The Stevedore hereby accepts such engagement and agrees to do and perform all the work required by it to be done or performed under this contract in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence to protect and safeguard the interests of the Administrator in all respects, and to avoid any delay, loss, or damage whatsoever to the Administrator".[3]

"4. (b) The Stevedore recognizes the relation of trust and confidence established between it and the Administrator by this contract and agrees to furnish its best skill and judgment in planning, supervising and performing the work in the shortest time practicable and to cooperate fully with the Administrator in furthering the latter's interests. The Stevedore further agrees to furnish efficient business administration and superintendence in performing the work".[4]

"8. Liability of Stevedore. While performing the work Stevedore shall, except as provided in Paragraph 9(e) hereof, be responsible for any and all loss, damage or injury (including death, wherever used in this contract) to persons, cargo, vessels, their stores, apparel or equipment, wharves, piers, docks, lighters, barges, scows, elevators, cars, carfloats, or other property or thing, arising through the negligence or fault of the Stevedore, its employees, gear or equipment; . . .".[5]

This would seem to be a contract similar if not identical to the one before this Court in *American Stevedores v.*

2. Apostles, *supra*, page 205.
3. Apostles, *supra*, page 212.
4. Apostles, *supra*, page 226.
5. Apostles, *supra*, page 234.

Porello,[5] 330 U. S. 446. If that be so, then all the Court decided in its *Rothschild* case was the meaning of the contract, a point which this Court specifically left open in the *Porello* case. We have no quarrel with the proposition that parties can, *by express contract*, waive rights or shift the burden of loss due to injury.

The Court in the *Hitaffer* case relied upon *Rich v. United States*.[6] Both were but interlocutory decisions. The *Rich* case seems to have been based upon contract. Whether the contract was express or implied is not clear, but we suggest that it may well have been an express written contract because most if not all War Shipping Administration contracts were written and most if not all contained some indemnification agreement similar to that quoted above from the contract in the *Rothschild* case. Certainly the Court which decided the *Rich* case intended to decide it upon the basis of contract. See *American Mutual Liability Ins. Co. v. Matthews*.[7]

The decision below in our case represents the view of the Third Circuit. It is really the rule originated by the Supreme Court of Pennsylvania in *Maio v. Fahs*[8] and applied to the Pennsylvania Compensation Act.[9] Our research has disclosed no other State which follows this rule.

Our belief that the Third Circuit rule is impractical if not impossible in operation under the Federal Act is predicated upon the differences between the Pennsylvania Act and the Federal Act.

The Pennsylvania Act is elective, the Federal Act is not. In Pennsylvania the Compensation Act limits medical expense to that incurred during the first 90 days after injury or an amount not in excess of $225.00. The Federal Act has no such limitations and in practice medical expense is paid so long as it is necessarily incurred.

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6. 177 F. 2nd 688.
7. 182 F. 2nd 322 at 324.
8. 339 Pa. 180 (1940).
9. 77 Purdons Statutes Annotated 411 et seq.

In Pennsylvania compensation stops after a set number of weeks; 300 weeks in the case of partial disability and 500 weeks in the case of total disability. The Federal Act as now amended, provides for the payment of compensation without limit as to time or amount in all cases of permanent total disability and the only limitation in cases of permanent partial disability is the present monetary limit of $10,000.00. ($11,000 in some cases involving loss of a member.)

In death actions the Pennsylvania Act provides for payment to a widow for 300 weeks. A minor child may collect during minority. Under the Federal Act the widow's right to compensation is terminated only upon her death or remarriage.

The most important practical difference between the two Acts is that under the Pennsylvania Statute in a case of permanent but partial disability, the payment of compensation is suspended during all periods when the injured employee earns an amount as great as that which he had been earning at the time of injury. Under the Federal Act an injured employee who is permanently but partially disabled is entitled to a percentage of disability award which may change from time to time as his condition changes. An injured employee who has sued a third-party and made a recovery presumably did so because he would recover more by that method than he would receive from his employer under the Compensation Act. As soon as his case has been tried and a judgment in his favor has been paid he loses all interest in any claim for compensation. The claim for compensation thereafter becomes one which benefits only the third-party tortfeasor who has paid the judgment in favor of the injured employee. The injured employee is no longer interested in applying to the Deputy Commissioner for periodic re-evaluation of the disability rating and the attendant periodic adjustment upward or downward of the compensation payments. Thus the third-party who has paid the judgment has a legal right only to

collect a small weekly sum and the right is largely controlled by the injured man.

In a death case the right to these weekly payments, so far as the widow would be concerned, would be measured by her lifetime or the period until her remarriage. Life expectancy tables might serve in the one case but there is no practical method of evaluating a widow's chance of remarriage.

We think it is thus plain that the only right that the original defendant obtains under the Third Circuit rule is the right to an unliquidated amount which would be payable weekly. The chances of increasing litigation rather than disposing of it are enhanced where the cause of action by the original defendant is simply broken down into a right to recover piecemeal.

Another important difficulty is the question of whether percentages of partial disability are to be fixed by the Deputy Commissioner to whom the Act relegates that function or whether a Judge in Admiralty or a jury in a civil case are to be called upon to evaluate the percentage of the injured employee's future disability in order that the original defendant may recoup a part of his loss from the employer or its compensation insurance carrier. We suggest that it would do violence to the scheme of the Compensation Act to relegate this function to a Court or a jury. Yet there is no way that the Court can force a determination by the Deputy Commissioner and even if it could, the Deputy Commissioner's opinion might well be held to be nothing more than advisory.

Looked at from another standpoint, all that the Third Circuit rule does is to deprive the employer of the right of subrogation which is granted him by § 33 of the Federal Act, 33 U. S. C. A. 933.

It is for these reasons that we suggest that the result reached by the Court below in the case at bar may seem to be equitable upon its face but is completely incapable of operation in practice.

This analysis of the four rules leads inevitably to the conclusion that from a practical as well as a legal point of view the result of the *Matthews* case has much to recommend it.

Our analysis of the four rules leads us to conclude that the result reached by the Court of Appeals in the *Matthews* case is proper both from the point of view of the practical enforcement and statutory interpretation of the Longshoremen's & Harbor Workers' Compensation Act. We will proceed to demonstrate the reasons for this conclusion.

The Clear and Explicit Wording of the Longshoremen's and Harbor Workers' Compensation Act Is Prima Facie Evidence of the Intent of Congress. § 5 of This Act Was Intended by the Congress to Make the Employer's Liability to Pay Compensation an Absolutely Exclusive Liability.

We start with the fundamental proposition that the clear wording of any Act of Congress is prima facie evidence of the intent of Congress in drafting and passing the Act in question. Hence the wording of the Act is sufficient to establish the intent of Congress, unless persuasively rebutted by evidence of a different or varying intent.

The plain fact is, that in all of the litigation and decisions involving the question of exclusiveness of remedy provided in § 5 of the Act, there has never been a shred of evidence produced tending to show that the Congress intended anything at variance with the plain and clear wording of this section of the Act. The Act became law on March 4, 1927. It was one of numerous Acts of so-called "social legislation", both State and Federal, which class of legislation had its inception several years after the turn of the century. It was then that numerous States enacted Workmen's Compensation Acts.

The case at bar necessarily and fundamentally involves the question of whether Congress intended § 5 of the Act

to provide a limited exclusive liability of the employer only as to the employee, or anybody "standing in his shoes" as a claimant, or whether it means exactly what it says in providing that the employer's statutory liability "shall be exclusive and in place of all other liability of such employer to . . . anyone otherwise entitled to recover damages from such employer, at law or in admiralty, on account of such injury or death . . . .". If the exclusive provision as to "all other liability of such employer to . . . anyone otherwise entitled to recover damages" from him does not preclude a claim by a third party for contribution or indemnity, there must be a showing of legislative intent that such claim is not precluded by the Act. There never has been, and, we respectfully submit, there cannot be any such showing of legislative intent. The plain fact is that the Congress never contemplated, and therefore had no intent in either direction regarding such a third party claim prior to the passage of the Act. The Congress simply intended that the liability of the employer provided in the Act should be absolutely exclusive, and so expressed itself in § 5 of the Act. Otherwise there would be some reference in the record of Congressional proceedings prior to the passage of the Act showing that the Congress was aware of the possibility of such a claim against the employer by a third party, and that such possibility had been taken into consideration. There is none.

The apparent failure of the Congress to consider the possibility of a claim by a negligent third party against an employer subject to the Act, upon the basis of contribution or indemnity, is less surprising than it otherwise might be, if the history of litigation on this subject is carefully examined. It is apparent that, subsequent to March 4, 1927, when the Act became law, the exclusiveness of the employer's liability provided by the Statute was recognized and accepted for a period of twelve years. The earliest reported decision in a litigated case subsequent to 1927 appears to have been the opinion of Judge Peters of the

United States District Court for the District of Maine, Southern Division, on February 14, 1939, in *Erline H. Samuelson Rederii v. Jarka Corporation*, 26 F. Supp. 304. In overruling exceptions to a Libel filed by a shipowner against a stevedore employer for indemnity or contribution, the shipowner having been held liable for damages and costs in a separate action brought by a longshoreman, Judge Peters made the following statement at Page 305, after quoting pertinent parts of § 5 on the subject of exclusiveness of liability:

> "The respondent contends that by the terms of the Act its liability for damages on account of an injury is limited to a person proceeding under the Act, and that as this libel is an action for or on account of the injury it cannot be sustained for that reason.
>
> "The language of the Act is not appropriate to the meaning respondent argues for. The liability excluded by the language is other liability of the employer to the employee, or anyone standing in his shoes, for damages 'on account of such injuries'."

The foregoing statement by Judge Peters was made without any citation of supporting authority, and without proof of any evidence of intent on the part of the Congress to so limit the general expression of exclusiveness of liability. It can hardly be said that the foregoing opinion "started the ball rolling". If it did so, the start was a very slow one, since the next reported opinion of importance on the subject appears to have been *The Tampico*, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942). This also appears to have been the first case in which there was a citation of highest authority in support of a decision allowing contribution from a stevedore employer in favor of a shipowner for one-half the amount of the libellant-employee's full damages decreed against the shipowner. The authority cited was *Aktieselskabet Cuzco v. The Sucarseco, et al.*, 294

U. S. 394. This case held that in a case of collision between two vessels where both vessels are at fault, while damages are divided between the two vessels, an innocent cargo owner can recover full damags from the noncarrying vessel. It further held that both vessels in collision being at fault, upon a division of damages between the two vessels, the noncarrying vessel can recoup from the carrying vessel one-half of the damages paid to the owner of the cargo on the carrying vessel, notwithstanding the fact that the Harter Act relieves the carrying vessel from liability to her own cargo resulting "from faults or errors in navigation or in the management of the vessel". It is believed that *The Tampico, supra,* is the first decision involving a claim for contribution or indemnity by a negligent third party against a stevedore employer, in which analogy was drawn to the collision cases in which the possible immunity of an owner of a carrying ship from any liability to its cargo in a case of mutual fault collision under the provisions of the Harter Act was considered, and rejected. It was not until 1947, five years after the decision in *The Tampico, supra,* that another decision of importance along similar lines [10] was reported, in *The S. S. Samovar,* 72 F. Supp. 574 (D. C. N. D. Cal.), holding that the builder, and the owner pro hac vice of the vessel were entitled to contribution from the negligent employer of the libellant-longshoreman "by well established rules of maritime law". In support of this holding the Court, at P. 588, cited four authorities: *The Sucarseco, supra; Erie R. R. Co. v. Erie Transp. Co.,* 204 U. S. 220, 225 (1907); *The Chattahooche,* 173 U. S. 540 (1899); *Briggs v. Day,* 21 Fed. 727, 730 (S. D. N. Y. 1884). All four of these authorities were collision cases, and except for the last, involved a consideration of the immunity provisions of the Harter Act. Thus it is obvious that

10. We do not include *American Stevedores v. Porello,* decided March 10, 1947, 330 U. S. 446, in this classification because the case involved a *contract* of indemnity. We believe that *Barbarino v. Stanhope S. S. Co.,* 151 F. 2(d) 553, (2 C. C. A., 1945) and *Cataldo v. A/S Glittre,* 41 F. Supp. 555 (E. D. N. Y. 1941) have little or no authoritative value here.

twenty years after the enactment of the Longshoremen's and Harbor Workers' Compensation Act, the collision cases were the only higher authority that could be found to support claims for contribution against a stevedore employer, whereas no evidence of the intent of the Congress otherwise than as expressed in the clear wording of § 5 of the Longshoremen's and Harbor Workers' Compensation Act had been produced.

Analysis of the Purpose, Scope and Intent of the Harter Act as Compared With the Same Elements of the Longshoremen's and Harbor Workers' Compensation Act Fails to Justify the Analogy to the Collision Cases Involving the Former Act, as Practically the Sole Authority for Limiting the Manifest Intent of Congress in the Latter Act to Provide an Absolutely Exclusive Liability on the Part of an Employer of Longshoremen and Harbor Workers.

The title of the Harter Act reads as follows: "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property."

The purpose of the Harter Act is well expressed in *The Willdomino* (C. C. A. N. J. 1924), 300 F. 5, certiorari dismissed (1926) 46 S. Ct. 205, 270 U. S. 641, as follows:

> "To meet the ever increasing attempts further to limit the liability of the vessel and her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, negligence, and other causes of liability by which the common law responsibility of carriers by sea was being frittered away, the Harter Act (27 Stat. 445 [this section and sections 191 to 195 of this title]) was passed. It was designed to fix the relations between the cargo and the vessel and to prohibit contracts restricting the liability of the vessel in certain particulars."

Section 3 of the Act entitled "Limitation of liability for errors of navigation, dangers of the sea, and acts of God" provides, briefly, that if a vessel owner transporting cargo to or from any port in the United States "shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied", neither the vessel nor her owners or their representatives shall become or be held liable for damage or loss resulting from faults or errors in navigation or in the management of the said vessel, or resulting from various other enumerated causes not pertinent here. Section 3 of the Act contains no expression indicating that the intent of the Congress was to make the relief from responsibility for damage or loss provided by the Act, absolutely exclusive of all claims other than claims made by the cargo owner. Of course the Harter Act did not relieve from all liabilities, but only from liability resulting from the enumerated causes.

The only active burden imposed by the Harter Act upon the shipowner in exchange for his benefit of limitation of liability provided in § 3 of the Act, was a duty to use due diligence to make his ship "in all respects seaworthy, and properly manned, equipped, and supplied". This was a light burden indeed, when it is considered that as a matter of self-interest a shipowner should use such diligence as an incident of the proper conduct of his business. As aptly stated in his concurring opinion by Chief Circuit Judge Learned Hand in *American Mutual Liability Ins. Co. v. Matthews et al.*, 182 F. (2d) 322, 326 (2nd C. A., 1950):

> "And while, as I have said, § 3 did make it a condition upon the release that due diligence should be used to make the ship seaworthy even in respects not relevant to the carriage, in practice that has not added a heavy burden."

The Longshoremen's and Harbor Workers' Compensation Act, on the other hand, was an act of social legislation

with deep humanitarian implications as expressed in *South Chicago Coal & Dock Co. et al. v. Bassett,* 104 F. (2d) 522, 526 (affirmed 309 U. S. 251) as follows:

> "The number of jurisdictional issues should not be increased beyond legal reason because the purpose of the Act was to expedite the hearing of claims and granting of awards and to simplify as greatly as possible the procedure in such matters, so that the needy, the helpless, and the ignorant would receive financial aid promptly."

The burden which the employer assumed under the Longshoremen's Act in comparison to the benefit derived is vastly greater than the burden assumed by the shipowner under the Harter Act. In fact the Harter Act merely grants the shipowner a privilege upon his compliance with a condition, whereas an employer who fails to undertake the heavy financial burden of securing compensation under the Longshoremen's Act is subject to an action in law or in admiralty in which action he is deprived of his defenses of fellow servant negligence, assumption of risk, and contributory negligence. On the other hand, if he secures payment of compensation, he becomes subject to a general liability to pay compensation limited only by the terms of the Act, regardless of fault or negligence upon his part. As a matter of quid pro quo, the condition, as a price of privilege, imposed in the Harter Act is not comparable to the burden and partial relief imposed in the Longshoremen's Act. Therefore, the by-passing of the clear provision for exclusive liability of the employer in § 5 of the Longshoremen's Act is not justified upon the basis of the collision cases, *supra,* involving the Harter Act.

The Only Satisfactory Solution of the Dilemma Presented by the Conflicting Decisions, Without Violating the Manifest Intent of the Congress as Expressed in § 5 of the Longshoremen's Act, Lies in Upholding the Absolutely Exclusive Provisions of § 5 of Said Act, in Accordance With the Decision in American Mutual Liability Ins. Co. v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950).

We suggest that it is noteworthy that the conflict on the question did not reach fruition until twenty-four years after passage of the Federal Act. There is not this great confusion with respect to the State Acts. Except for Pennsylvania and New York, where the contract rule is applied, all States seem to grant this exclusive liability. This fact plus the years of operation under the concept of exclusiveness seem to lend weight to our view that the Matthews result has the advantage of being practical.

It also avoids the conflict among §§ 5, 14 and 33 of the Federal Act. Section 14 requires payment of compensation promptly and without an award. Under § 33 an employer who compels his employee to obtain an award for compensation before the Deputy Commissioner can obtain control of the litigation against the third party because the right of action is assigned to the employer by operation of law. The inevitable result is conflict between the prompt payment of compensation and the natural desire of the employer to protect himself by compelling the employee to obtain an award. The employer's self interest is not fanciful, as is illustrated in the case at bar. If Baccile had been compelled to obtain compensation under an award, his employer could have sued or not, as it chose, and could have settled for an amount sufficient only to cover the employer's expenses and future compensation liability.

To say that insurance is the complete answer to this question ignores reality. All liability insurance policies (in which high limit coverage can be purchased) with which we are familiar exclude from coverage a claim by an em-

ployee. The standard policies of Workmen's Compensation insurance are not intended to cover this liability and, if they have any coverage at all outside the Act, it is only some low limit coverage intended to apply in cases of illegal employment.

Thus we can see every practical reason why the status quo should be maintained. That it is practical has been demonstrated. It certainly avoids a strained interpretation of § 5 and is certainly in accord with the wording of the pertinent sections of the Act. We suggest that judicial legislation such as was attempted by the Circuit Court in our case can lead only to chaos. If the scheme of things is to be changed, Congress should legislate. Piece by piece judicial legislation cannot solve the problem satisfactorily.

POINT 2.

The Maritime Rule of Contribution Is Equal Division of Damages Where Contribution Is the Remedy.

We have already pointed out that in our view the present point need not and should not be reached. We urge (in No. 197) that Halcyon has not made out any case for contribution because it was primarily liable and Haenn's liability was but secondary. If we are wrong in that, we have argued that the Compensation Act should be a complete defense. As a backstop, and as an answer to what we view as an unsound legal argument, we urge that under the Maritime Law, contribution is enforced by dividing damages and not by apportioning them.

This point presents a novel problem in that Halcyon is urging the Court to pronounce the rule that in a suit for contribution between tort feasors, damages shall be based upon comparative fault. We assume only arguendo that Haenn is a tort feasor in the same class as Halcyon.

As we will hereinafter demonstrate, only once before in the long history of contribution under maritime law has such a result actually been reached. *Portel v. United States*, 85 F. Supp. 458. As we will attempt to show, in that case

the Court failed to analyze language properly and took words out of context to arrive at a result which today stands as the only case where such a result has been reached. A reading of the opinion makes it plain to us that although the Judge in the *Portel* case believed that he was applying a rule recognized by the maritime law he was really acting upon a misinterpretation of the authorities.

The main thrust of our argument will seek to establish that it is no longer open to the Courts to change the rule of the maritime law of contribution between tort feasors from division of damage to apportionment of damage. We say this because the United States has consistently refused to adopt the Brussels Convention of 1910. That refusal establishes a legislative policy as strong as a positive enactment on the subject. Whatever arguments can be made concerning the fact that more equitable results may be achieved under a system of apportionment, that is an argument which is properly addressed to Congress and not to the Courts. We therefore agree with Judge Learned Hand, dissenting in *National Bulk Carriers Inc. v. United States* [11] when he says that Courts should apply the doctrine unflinchingly. We will develop all of the phases of these arguments more fully later in this brief.

Historical Background.

Halcyon's argument is that in maritime law, the doctrine of equal division of damages between tort feasors obtains or should obtain only in cases of collision between vessels. Halcyon apparently does not admit that damages caused by collision are only one phase of the field of maritime tort and that no sound argument has been advanced why uniformity should not prevail within the field of maritime tort. This is by no means inconsistent with our earlier argument that there is an altogether different *quid pro quo* between the Harter Act as it effects collision litiga-

11. 183 F. (2) 405, 410—quoted by Petitioner commencing at Page 17 of its brief.

tion and the Longshoremen's and Harbor Workers' Compensation Act as it effects injury claims.

Halcyon does not suggest *why* a different rule should obtain in a personal injury suit. We will attempt to demonstrate that historically the division of damage rule of the American Maritime Law is not only *the* rule, but is a sound rule. If it is to be changed then much other maritime law should be changed to accommodate. That is a legislative and not a judicial problem.

Historical background is sometimes used by Courts as a basis for rationalization. Article 14 of the Laws of Oleron provided that in cases of collision, except where fault was intentional, "the whole damage shall be in common, be equally divided and appraised half by half". To the same effect were the Laws of Bruges (1350-1380) and the Black Book of the English Admiralty, Volume 4, page 321. Article 26 of the Laws of Wisby provided that in cases of collision, "the two ships shall jointly stand to the loss".

The leading article on the subject of divided damages is by George C. Sprague, 6 N. Y. U. Law Review 15. Sprague notes the fact that in the English reports the question of divided damages is mentioned most frequently in reference to collision litigation and accounts for this by reason of the fact that in those old days personal injury cases must have been rare indeed. For one reason the mariners all had an interest in the voyage if they were not joint owners of the ship. They loaded and unloaded the cargo themselves without machinery which in the present day is a frequent cause of accidental injury. Thus collision and to a lesser extent claims for loss or damage to cargo comprised the bulk of the litigation in the field of maritime tort.

Sprague concludes that the rule is that, as between two tort feasors, the damages of the innocent third party are divided equally. Sprague's conclusion that uniformity is highly desirable in all cases under the maritime law goes far to answer Halcyon's argument that the division of dam-

age rule applies in collision cases but apportionment of damage should apply in cases of personal injury. If uniformity is desirable, it is desirable throughout the field of maritime tort, not merely in one segment of it. Cf. *Garrett v. Moore-McCormack Lines, Inc.*, 317 U. S. 239.

Halcyon's Argument That Equal Division of Damages Obtains Only in Cases of Collision Is Not Well Founded.

Halcyon carefully restricts its statement of the question raised by it. It admits (brief, page 17) that the rule of equal division applies in cases of collision. It would probably concede that if the litigation sought recovery for damage or loss of cargo and the plaintiff was an innocent third party to whom loss had been caused by joint tort, the loss should be equally divided.

Certainly that is the law under such decisions as *Aktiselskabet Cuzco v. The Sucarseco*, 294 U. S. 394, and *The Chattahoochee*, 173 U. S. 540.

Halcyon fails to make the distinction between contribution as between the two tort feasors and the rule of apportionment of damages which is applied as between plaintiff and defendant or libellant and respondent *where both have contributed to the plaintiff's loss.* Apportionment as between plaintiff and defendant has been one of the attributes of which Admiralty has long been proud. Admiralty early rejected the common law concept of contributory negligence as a bar to recovery. Congress in enacting the Jones Act, 46 U. S. C. A. 688, has applied the rule of comparative fault in suits between an employee as plaintiff and an employer as defendant. Congress has never gone further than that and applied any rule of apportionment as between two tort feasors both liable to a plaintiff. As we said earlier, Congress, by refusing to accept the Brussels Convention, has consistently refused to adopt a policy of apportionment as between tort feasors.

In *American Stevedores Inc. v. Porello*, 330 U. S. 446, this Court had before it a case where the issue to be de-

cided was the contribution between tort feasors whose actions had combined to cause injury to a third party. There was a *contract* between the two providing that the stevedore should be responsible for any and all damage or injury while loading the vessel. Halcyon leans heavily upon the *Porello* decision but the important thing to be noted is that at the point where the Court makes the statement "Comparative negligence is not unknown to our maritime law" it is discussing the possible intentions which may have been in the minds of the parties when they adopted the language in the contract being considered. Of course comparative negligence is not unknown to the maritime law and of course it may have been the intention of the parties in making the contract which was under consideration in the *Porello* case to adopt comparative negligence. It is non sequitur to argue from this that this Court was thus approving a rule of comparative negligence as between tort feasors where no contractual agreement was involved.

All prior decisions on the subject negative any such inference. Early American cases divided on whether a libellant should be permitted to recover at all for personal injuries in a case where the libellant had been guilty of contributory negligence, even though there was clear fault on the part of the respondent.

Compare

Peterson v. The Chandos, 4 F. 645;
Holmes v. Oregon & California Ry. Co., 5 F. 523;
The Manhasset, 19 F. 430;

with

The Explorer, 20 F. 135;
The Wanderer, 20 F. 140.

The equal division rule of *The Explorer* and *The Wanderer* was consistently applied by lower courts for a number of years and in 1890 the Supreme Court approved it by its decision in *The Max Morris*, 137 U. S. 1.

In the last cited case the petitioner made exactly the same argument which Halcyon makes here. It contended that in a case of personal injury contributory negligence should be a bar and that the rule calling for division of damages where both plaintiff and defendant were negligent *applied only in cases of collision* between vessels. The Supreme Court rejected that argument.

After the decision in *The Max Morris, supra,* a long line of cases approved the rule of division. *The Frank and Willie,* 45 F. 494, *John A. Roebling's Sons Co. of New York v. Erickson,* 261 F. 986, *Storgard v. France & Canada S. S. Corporation,* 263 F. 545, *The Henry S. Grove,* 22 F. 2nd 444 and *The Arizona v. Anelich,* 298 U. S. 110.

In *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424, the Supreme Court was considering a case brought *under the Jones Act,* 46 U. S. C. A. 688. The defense there was assumption of risk and in its decision this Court demonstrates that assumption of risk is but one phase of contributory negligence. The discussion in the *Smith* case makes it abundantly plain that the Court was following the congressional mandate to apportion damages between plaintiff and defendant in a Jones Act suit. When it discussed apportionment of the loss, it was following the maritime doctrine applied in cases where the Court was called upon to divide the loss in some manner as between plaintiff and defendant. Rightly understood, nothing in the *Smith* decision can be taken as support for the argument that the rule of proportionate distribution of loss was to be applied in maritime cases as between two tort feasors whose actions had combined to cause injury to the plaintiff.

Stokes v. United States, 144 F. 2nd 82, is explained on the same ground. The Court there had before it an employee-employer situation where the loss had to be apportioned between a plaintiff and a defendant and not between two defendants in an action for contribution.

Earlier in this brief we cited *Portel v. United States,* as the sole authority supporting an award in an action for

contribution upon the basis of proportion rather than a basis of division. To reach that result, the Court in the *Portel* case relied upon the language of this Court in the *Porello* decision, *supra*. It failed to note the distinctions we have made and it failed to consider that where the *Porello* decision mentions comparative negligence it does so with reference to possible interpretations of a contract.

> ". . . we do not believe that the last alternative (division of loss in proportion to fault), which provides for a measure of comparative negligence, is *necessarily beyond the intent of the parties.*" (Emphasis ours.) *American Stevedores v. Porello*, 330 U. S. 446 at 458.

This Court was not, we submit, laying down nor attempting to lay down any rule to be applied in cases arising under the general maritime law where no interpretation of a contract is involved. What parties may intend by a contract of indemnity entered into between them has a number of possible interpretations but they involve interpretations of the contract and not of the general maritime law. Cf. *American Mut. Liability Ins. Co. v. Matthews*, 182 F. 2nd 322.

Thus it is that a careful examination of the holdings of the cases cited by Halcyon strips the camouflage from the words and phrases which Halcyon has plucked at random and shows that the restricted doctrine of comparative negligence in Admiralty applies in cases dividing damages between plaintiff and defendant. It is not the rule of contribution between tortfeasors.

An Analysis of the Decisional Law on Contribution.

The decided cases under maritime law involving true contribution can be separated into four classes.

1. Two vessels mutually at fault collide and thus damage the cargo owned by a third person.
2. Two vessels mutually at fault collide and cause personal injury to a third person.

3. Cases other than collision where tortfeasors mutually at fault damage cargo owned by a third person.

4. Cases other than collision where tort feasors mutually at fault cause personal injury to a third person.

We would emphasize that our discussion of the rule of divided damages is not by any means a concession that the facts of the present case involve that problem at all. We are too much convinced of the merits of our own petition and our other points for that. Assuming arguendo only that as between Halcyon and Haenn there is any ground for dividing damages at all, the present case clearly comes within the fourth class listed above.

Bearing in mind that, except in the *Portel* case, in every case where *contribution* has been awarded as between tort feasors whose actions combined to cause an injury to a third person, the share of the contributors have been equal, we proceed to a discussion of the decisions.

Halcyon concedes (brief 17) that in cases of collision the rule is equal division of damages. We assume that it concedes that equal division is the rule in Class 1 above. If it does not *The Chattahoochee, supra,* foreclose any argument to the contrary.

By its restricted concession Halcyon is apparently attempting to avoid the analogy between the present case and Class 2 above. It is submitted that in personal injury cases arising from collision due to mutual fault, the damages are divided equally. *The Washington,* 76 U. S. 513.

In our Class 3 a review of the cases again finds that the Courts apply the rule of equal contribution. It has been decided many times that where the carrying vessel acts as bailee for the cargo and sues a third party, the rule of half damages applies where cargo damage results from mutual fault other than by collision. *Mason v. The William Murtaugh,* 3 F. 404, *The Bordentown,* 16 F. 270, *The Reba,* 22

F. 546. See also the cases cited in *The Max Morris, supra,* 137 U. S. at 32.

We have already said that the present case falls into our group 4. The rule of equal division has been consistently applied in these cases as well. The decisions by the District Court in *American Mut. Liability Ins. Co. v. Matthews,* 87 F. Supp. 854, reversed on other grounds, 182 F. 2nd 322; *New York & Porto Rico S. S. Co. v. Lee's Lighters,* 48 F. 2nd 372, *The Tampico,* 45 F. Supp. 174 at 176, and *The Samovar,* 72 F. Supp. 574 at 589, apply the equal division rule in cases of personal injury. They specifically recognize the distinction to be drawn where the question is division of a loss as between plaintiff versus defendant and a suit for contribution by one tort feasor against the other.

Thus American Admiralty has a clear rule in cases of contribution between tortfeasors. Some courts have failed to see the distinction between apportionment of fault between plaintiff and defendant and contribution between tortfeasors and Halcyon would perpetuate this error.

This Court's decision in *Phoenix Ins. Co. v. The Atlas,* 93 U. S. 302, recognized the rule to be that the innocent cargo owner could recover his full damages against one vessel if he sued but one vessel. The decisions specifically recognize equal division of the loss where both vessels were before the Court at the suit of the cargo owner or where the first vessel, having paid the loss, sues the other.

A rule of proportionate damage and comparative negligence may be desirable in contribution cases but the rule of proportionate damage cannot be made to work properly without legislative changes applying uniform rules of proportionate damage and changing some of our fundamental concepts of tort law. Legislative policy indicates the intention of Congress to reject apportionment as the maritime rule of contribution. Otherwise it would long since have adopted the Brussels Convention.

Our statement that a rule of proportionate damages and comparative negligence cannot be superimposed upon our system may best be illustrated by an example.

P is injured due to the concurrent or "joint" negligence of D1 and D2. P sues D1 and because of inability to obtain service, D2 is not brought upon the record. D1 defends on the ground that P's injury was due to a combination of contributory negligence by P and the negligence of D2. The jury finds P guilty of contributory negligence and D1 guilty of negligence. It assesses the degree of P's contributory negligence at 20% of the total. It finds that as to the balance D1 contributed one-fourth and D2 three-fourths. It finds that P's total damages amounted to $10,000.00. What amount is P entitled to collect from D1 and what rights, if any, does D1 have against D2?

The concept that P should be entitled to collect the entire sum of his damages from D1 is part and parcel of our common law system in which comparative negligence has no place. If this common law rule is applied, then the true comparative negligence and apportionment of damages theory has been misapplied if P is permitted to collect his $8,000.00 from D1. This is so because as between P and D1, each has been negligent and contributed to the loss in the same degree (i.e., one-quarter of the 80% not attributable to P). Under a system of true comparative negligence D1 should pay but $2,000.00.

The result which would occur today under our confused concepts would be that P would collect his entire judgment of $8,000.00 against D1. That does not conform to basic theories of comparative negligence nor rudimentary principles of justice if the negligence of the actors is to be compared at all. Comparative negligence is thus made to serve only P. It preserves his right which would be defeated *by contributory negligence* under the common law. As between D1 and D2, the remnants of common law reasoning apply so as to deprive them of the benefits of comparative negligence. They should be granted some quid pro quo

if they are deprived of the common law defense of contributory negligence. D1 loses both his penny and his cake.

Just as years ago Pennsylvania and some other states [12] attempted to administer equity through the common law forms and found it so unsatisfactory that legislation was eventually necessary, so an attempt to administer comparative negligence and apportionment of damages through forms having their origin in the common law is unsatisfactory. If any such system is to be adopted it requires legislative overhauling of the entire process. It cannot be done satisfactorily by judicial decision which can deal with but one set of circumstances in a particular case. Such decisions frequently leave courts in a dilemma when the next case comes before them and the facts are slightly different to the point where the rule last announced, which seemed good at the time, will not work substantial justice.

Assuming Arguendo That the Maritime Law Is Not Division of Damages, Still the Moulding of the Verdict Was Proper.

Halcyon urges that it was error for the District Judge to mold the verdict, arguing that it was an abuse of discretion (brief, 17) for the District Court to substitute its own views for those of the jury. Halcyon would deny the right of the Trial Court to exercise any discretion at all on the subject.

To us the District Court's Opinion clearly indicates that what molding was done was because the court was "constrained" to exercise a "conscientious discretion" and to bring the verdict in line with "The usual rule in Admiralty", which "in the absence of contract, is equal contribution between joint tort feasors" (R. 179).

If the usual rule is the proper rule, as we here contend, then molding of the verdict was proper. Even if the usual rule is not the proper rule, the action of the Trial

12. Bispham; Principles of Equity (10th Ed.) p. 27.

Judge was within his discretion and cannot be set aside by this Court unless there are *no* grounds to support it.

We take it that substantive rights are not dissipated by the choice of a common law forum in a case which, except for 28 U. S. C. A. 1331 (1), would have been heard in Admiralty. Rules of the Maritime Law govern no matter what the forum. *Garrett v. Moore-McCormack Lines, supra.*

The cases cited by the Court below amply demonstrate the rule that the "conscientious discretion" of the Trial Judge may "give or withhold damages" in admiralty. There is no reason why that principle should not apply in a suit for contribution which is likewise based upon Admiralty and Maritime Law.

In *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424 at 432, this Court said:

> "*The power of the trial judge* to guide and instruct the jury *and his control over* excessive *verdicts* afford as adequate protection to owners as in any other case . . .". (Emphasis ours.)

We take this language as ample supporting authority for the action of the Trial Judge in molding the verdict. True it is that we regard it as an unnecessary argument for the reason that we think this Court should never have to reach it in our case. Nevertheless, we suggest that, no matter which ground motivated the District Judge, his action was proper. He had the right and the duty to mold any verdict he considered improper. Since the case was based upon principles of maritime law, his "exercise of conscientious discretion" was a right which Haenn was entitled to have enforced [13] in its favor once the judicial conscience was aroused.

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13. Opinion of District Judge McGranery, R. 225.

CONCLUSION.

We respectfully submit that Halcyon's petition raises points which should not be reached. If they are, then we ask this Court to consider the problems and resolve them so as to furnish guidance for lower courts which are today sailing upon seas of dispute and doubt.

Respectfully submitted,

MARK D. ALSPACH,
JOHN B. SHAW,
T. E. BYRNE, JR.,
Counsel for Respondent,
Haenn Ship Ceiling & Refitting Corp.

KRUSEN, EVANS AND SHAW,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 197

HAENN SHIP CEILING AND REFITTING CORPORATION,

Petitioner,

vs.

KALCYON LINES AND VINKE AND COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MARK D. ARSPACH,
THOMAS E. BYRNE, JR.,
225 South 15th Street,
Philadelphia 2, Penna.,
Counsel for Petitioner.

JOHN T. PHILLIPS,
Of Counsel.

INDEX

TABLE OF CASES CITED

	Page
American Mutual Liability Ins. Co. v. *Matthews*, 182 F. 2nd 322	11
Atlantic Coast Line R. Co. v. *Tiller*, 142 F. 2nd 718 (CA 4) reversed on other grounds 323 U. S. 574	9, 15
Baltimore & Ohio R. Co. v. *Reeves*, 10 F. 2nd 329	17
Baltimore & Ohio R. Co. v. *Deneen*, 161 F. 2nd 674	17
Boston Woven Hose & Rubber Co. v. *Kendall*, 178 Mass. 232, 51 LRA 781, 59 N.E. 657	24
Boyer's Sons, Petition of The, No. 34, 25 F. 2nd 602	21
Busch & Latta Painting Co. v. *Woermann Construction Co.*, 310 Mo. 419, 276 SW 614 (1925)	25
Dair v. *United States*, 16 Wall. 1, 21 L. Ed. 491	26
Eagle Indemnity Co. v. *United States Lines Co.*, 86 F. Supp. 949	23
Hawn v. *Pope & Talbot, Inc. et al.* (Opinion of McGranery, Jr., D.C.E.D. Pa., filed 17 July, 1951)	23
John Wanamaker, New York Inc. v. *Otis Elevator Co.*, 228 NY 192, 126 NE 718 (1920)	25
Keller Building Co. v. *E. H. Titchener & Co.*, 190 App. Div. 135, 179 NYS 344 (1919)	25
Lyon, Potter & Co. v. *First National Bank*, 85 F. 2nd 120	16, 17
Mallory S.S. Co. v. *Druban*, 17 Ala. App. 365, 84 So. 874 (1920)	25
Maryland To Use of Markley v. *Baldwin*, 112 U. S. 490	9, 16
Miller v. *New York Oil Co.*, 34 Wyo. 272, 243 Pac. 118	26
Mowbray v. *Merryweather, L.R.* (1895) Q.B. 857	26
New York & Porto Rico Steamship Co. v. *Garcia*, 16 F. 2nd 734	17
Nowcry v. *Johnson*, 69 F. Supp. 755	10
Pennsylvania Company v. *Roberts & Schaefer Company*, 250 Ill. App. 330 (1928)	25

Page

Pfarr v. *Standard Oil Co.*, 165 Iowa 657, 146 N. W. 851 (1914) 25
Porello v. *United States*, 153 F. 2nd 605, reversed and remanded 330 U. S. 446 11
Seas Shipping Company v. *Sieracki*, 328 U. S. 85, ... 9, 10, 22, 23
St. Louis, I. M. & S. Ry. Co. v. *Needham*, 63 F. 2nd 107 ..... 16, 17
Stokes v. *United States*, 264 U. S. 14 15
Sulovitz v. *United States*, 64 F. Supp. 637 ..... 10, 23
Union Stock Yards Co. v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217 20
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Washington Gaslight Co. v. *District of Columbia*, 161 U. S. 316 20
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 197

HAENN SHIP CEILING AND REFITTING CORPORATION,

Petitioner,

vs.

HALCYON LINES AND VINKE AND COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Haenn Ship Ceiling and Refitting Corporation respectfully prays that a writ of certiorari shall issue out of this Court directed to the United States Court of Appeals for the Third Circuit to review the judgment of that Court which modified a judgment which had been entered against the Petitioner in the United States District Court for the Eastern District of Pennsylvania, should your Honorable

Court issue a writ upon the petition (No. 62 of October Term, 1951) of Halcyon Lines and Vinke and Company, the third-party plaintiff below in this case.

Summary and Statement of Matter Involved

History of the Cause of Action

The original suit in this case was instituted by Salvadore Baccile. He named as defendants Halcyon Lines and Vinke and Company, alleging that they owned the Steamship "Stad Vlaardingen". The original defendant filed a third-party complaint against Haenn Ship Ceiling and Refitting Corporation, the employer of Baccile.

For brevity, we will hereinafter refer to the parties as "Baccile", "Halcyon" and "Haenn".

Before the "Stad Vlaardingen" arrived in Philadelphia in November of 1947, it had made a voyage from Montreal to Rotterdam and thence to Philadelphia. At Montreal, in order to equip the vessel to carry grain, Halcyon had caused equipment known as grain fittings to be installed in the ship. One of these appurtenances was a grain feeder which is a large square box without top or bottom. The vessel had an upper and a lower hold, but in carrying bulk grain the upper hold is not used. The lower hold is loaded with loose grain. The grain feeder, rectangular in shape (8 feet by 28 feet) and ten feet high, is built in the hatch opening and extends from the main deck to the top of the lower hold. Its function is to hold loose grain. As the grain in the lower hold settles during the voyage, grain from the feeder flows by gravity into the lower hold and fills up the spaces caused by settling.

After these feeders were installed at Montreal in October, the vessel was loaded with grain which it carried to Rotterdam. During the unloading there, the grain fittings

of the vessel were damaged (43, 44a).[1] This fact was known to the Master of the vessel but he took no steps to warn Haenn's employees when they came aboard the ship at Philadelphia.

Haenn is a shoreside company at Philadelphia which is engaged in supplying material and workmen. In the present case, these were furnished on a time, material plus percentage basis (61a). Baccile was employed as a carpenter by Haenn.

It is important to bear in mind that there were five or six separate holds in the vessel and that each was equipped with grain fittings including a feeder box. The accident in this case took place in the feeder at the No. 2 hatch. The hatch is the opening at the main deck to the hold. There was other work to be done in the lower hold but there was no connection between it and the work to be done in the feeder.

The work to be done by Haenn had been outlined for the ship by the Inspector for the Board of Underwriters. This Inspector's approval was necessary before the ship could load the cargo of grain which it was to carry from Philadelphia. The only work required and pointed out to Haenn in the No. 2 feeder was the tacking of burlap on the inside wall of the feeder, in order to prevent grain from sifting through the joints of the feeder walls into the upper hold (45a).

When the feeder had been constructed at Montreal, planks had been built into the bottom of it. These planks, referred to in the evidence as staging or stage planks, were

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[1] The record in this case has been filed by Halcyon, petition No. 62 of October Term, 1951, and all references are to the Appendix filed in the Court below by Haenn, Appeal No. 10,219, and material printed subsequent to the aforesaid appendices included in said record.

inserted at the bottom of the feeder for no other purpose than to be used for the convenience of the men who had to tack the original burlap and any workmen who might be called upon subsequently to replace or repair this burlap (115a, 116a).

Similar planking was erected in other feeders on the vessel and had actually been used by Haenn's employees including Baccile earlier on the day that the accident occurred. This use of the stage planking by the employees of Haenn was known to the ship's officers, who had observed the carpenters going about their work prior to the accident.

Late in the afternoon of November 25th, Baccile and another Haenn employee were sent to the No. 2 feeder to perform the rather small job of retacking the burlap there. In accordance with the custom of such shore workmen, at least, in Philadelphia and Montreal, they availed themselves of the stage planking at the No. 2 feeder. To get to the stage planking they used a ladder which was lowered into the feeder and rested on one of two stage planks in the No. 2 feeder. This was the normal manner in which to do the work. On one side of the feeder, Baccile went down on a plank and completed the job of retacking the burlap on that side. After completing his work on this side of the feeder, Baccile returned to the deck, and helped move the heavy ladder from the staging on which he had been working, to the staging on the other side. It was this stage planking which eventually fell.

When they put the ladder in place they tapped the plank twice with the bottom of the ladder. This is a usual and customary precaution. The plank appeared solid and Baccile then went down the ladder on to the stage plank which was nine inches wide. He stepped around the ladder and walked to the far end of the plank. He

examined the work to be done and began to walk back toward the foot of the ladder, to inform the men above as to the material he would need. Before he could get to the bottom of the ladder, the plank gave way and he fell to the bottom of the hold, receiving serious injuries.

The plank did not break but apparently one of the cleats supporting the end of it pulled away. This cleat had been covered by the torn burlap and was not seen by Baccile or any other Haenn employee prior to the accident.

History of the Case

Baccile sued Halcyon and based his action upon averments of negligence on the part of Halcyon, and a breach of the warranty of the seaworthiness of the vessel (7a). Halcyon denied liability to Baccile and then issued a third-party complaint against Haenn. Halcyon's third-party complaint originally sought full indemnity from Haenn (15a), but it was later amended so as to allege that Haenn was "jointly liable" with Halcyon, and that Haenn "should be required to *contribute* to the payment of any and all damages adjudged to the plaintiff". (Emphasis ours.)

When the case was called for trial, Halcyon settled with Baccile and agreed that judgment should be entered against it and in favor of Baccile. The case then proceeded to trial on the issue of Halcyon's right to recover contribution from Haenn.

While Halcyon's third-party complaint against Haenn was couched in the most general of terms, the issues actually litigated at trial and submitted to the jury founded Halcyon's right to contribution from Haenn upon two separate theories. Halcyon's theory No. 1 is clearly presented by its requests for instructions to the jury which were affirmed by the Trial Judge. Halcyon's first point for charge (138a) asked the Court to instruct the jury that

there was a duty on the part of Haenn to make an inspection and examination of the grain fittings. Further, Halcyon requested the Trial Judge to charge that if both the shipowner and Haenn "both failed to make proper inspections to determine whether the grain feeder in which the plaintiff was to perform his work was safe they were negligent. . . .". (Request No. 5, 138, 139a). These points were read to the jury (160a, 161a). Exceptions were taken to them (143a-165a).

The other theory upon which Halcyon based its claim for contribution from Haenn was that Haenn had failed "to perform the work of repairing grain fittings in the vessel in a careful and proper manner". (Halcyon's Requests for Charge, No. 1 and No. 2, 138a). Exception was likewise taken to this instruction.

On the question of Haenn's negligence, the jury returned a general verdict (See Answer to Interrogatory No. 1, 173a). An Interrogatory was propounded addressed to the respective degrees of fault on the part of the two parties, but that does not concern us in the petition in the present case. It is before the Court in connection with Halcyon's petition, No. 62, October Term, 1951.

In the District Court Haenn moved for judgment notwithstanding the verdict, for a new trial, and in the alternative to mold the verdict. The District Judge denied Haenn's motions for judgment notwithstanding the verdict and for a new trial, although the verdict was molded to provide that Halcyon and Haenn should contribute equal amounts toward the settlement which Halcyon had made with Baccile. We think it proper to add at this point that Haenn does not dispute the propriety of the settlement or the amount of the settlement which Halcyon made with Baccile.

Both parties appealed. Haenn contended, *inter alia*, that no liability could be imposed upon it for its alleged

negligence in failing to inspect and discover a defect in an appliance owned and furnished for its use by Halcyon.

The Court of Appeals affirmed the judgment holding Haenn liable, but it did so upon the ground that its independent examination of the record led it to conclude that the jury might have found "Haenn negligent, *not merely in failing to inspect*, but as well in failing to go about its work properly". (Opinion, R. 185). (Emphasis ours.)

Thus affirmance of the judgment was predicated upon the theory that there was evidence which would support the verdict if the jury believed that Haenn had failed "to go about its work properly". The Court of Appeals did not consider that the jury might just as well have based its verdict upon Haenn's failure to inspect the stage planking before it permitted Baccile to work on it. Thus the Court below ignored the well settled rule that where there has been a general verdict, and the case has been submitted to the jury under instructions that they may find against the defendant upon either one of two theories, both theories of liability must be properly submitted. Otherwise a reviewing court is only speculating as to which theory formed the basis for the jury's finding.

Judgment was entered by the Court of Appeals for the Third Circuit on February 21, 1951. Halcyon filed its petition for certiorari on May 18, 1951. Upon the petition of Haenn Mr. Justice Burton entered an order on May 11, 1951 extending Haenn's time to file this petition to July 20, 1951.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 21, 1951. On May 11, 1951, Mr. Justice Burton entered an Order extending the time within which the Petitioner herein could file a Petition for a writ of certiorari to July 20, 1951.

The jurisdiction of this Court to entertain this course and to grant the same is provided in 28 U. S. Code Sections 1254 (1) and 2101 (c).

Opinions Below

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania denying the Petitioner's motion for judgment notwithstanding the verdict and for a new trial was filed April 3, 1950. It is reported 89 F. Supp. 765 and appears in the record, pages 41-46.

The opinion of the United States Court of Appeals for the Third Circuit written by Circuit Judge Kalodner for himself and Judges McLaughlin and Staley was filed February 21, 1951 and is reported 187 F. (2d) 403. It appears in the record on pages 183-189.

Questions Presented

I. Where the instructions of the Trial Judge to the jury permit the jury to base its general verdict upon either one of two theories and one theory is erroneous, can a reviewing Court sustain the verdict upon the ground that there was evidence to support recovery upon the correct theory and therefore was not required to examine the incorrect instruction.

II. Where a shipowner furnishes the employees of a shoreside contractor with an appliance which fails in normal use can the shipowner who has been sued by the injured employee recover contribution from the plaintiff's employer upon the ground that the employer was negligent in failing to inspect the appliance which the shipowner furnished and discover the defective condition which brought about the accident and injury to the additional defendant's employer.

III. Where a shipowner supplies an appliance to a contractor which is used in a normal manner, can the shipowner later claim that such use was negligent and a breach of duty to him.

IV. Is the warranty of seaworthiness which a shipowner owes to a stevedore injured on board his vessel (*Seas Shipping Company* v. *Sieracki*, 328 U. S. 85) likewise owed to a shoreside carpenter who comes aboard the vessel for the purpose of making it ready to receive cargo.

Reasons for Granting the Petition

I. The Court of Appeals recognized that the District Court had submitted the case to the jury upon alternative theories of liability. In its apparent haste to reach the question of contribution and to be the first Federal Court to adopt the so-called Pennsylvania Rule of contribution between joint tortfeasors in cases where one of the alleged tortfeasors is the employer of the injured plaintiff, the Court of Appeals passed over the more fundamental error in the case. That error was the submitting of the case to the jury upon two theories and the furnishing of a correct instruction to the jury upon only one of them.

Such a procedure is clearly in conflict with decisions by this Court and by numerous Courts of Appeal:

1. *Wilmington Star Mining Company* v. *Fulton*, 205 U. S. 60;

2. *Maryland Use of Markley* v. *Baldwin*, 112 U. S. 490.

Such a rule is in conflict with a host of decisions by the various Courts of Appeal. *Stokes* v. *United States*, 264 U. S. 14; *Atlantic Coast Line R. Co.* v. *Tiller*, 142 F. 2nd 718, (CA 4) reversed on other grounds, 323 U. S. 574.

This rule is followed without question in the lower Federal Courts, *Nowery* v. *Johnson*, 69 F. Supp. 755 at 759.

II. It is not clear whether the Court of Appeals conceded the validity of Haenn's argument that Halcyon owed the primary duty to furnish a safe place in which Haenn's employees could work, or merely passed over this question on the ground that recovery could be sustained on a second theory, namely that Haenn had failed to go about its work in a proper manner.

In doing so, it ignored established law that the mere failure to inspect an appliance furnished by another does not make the defendant whose fault lay in his failure to inspect a joint tortfeasor with the party who furnished the defective appliance. Rather the party whose fault lay in his failure to inspect and discover the defect is entitled to indemnity from the party who initially furnished the defective appliance or created the dangerous condition. This is so because the primary negligence is the latter's and the negligence of the party who failed to inspect is but secondary.

III. In refusing to instruct the jury that the vessel owner owed the employer the duty to furnish a seaworthy vessel, the District Court and the Court of Appeals refused to follow both the reasoning and the rule of this Court in *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85.

That decision has been extended to cover the case of a shoreside carpenter working on board a vessel who is injured by reason of a defect in one of the vessel's appliances. *Sulovitz* v. *United States*, 64 F. Supp. 637. It is plainly one of the bases of Baccile's complaint against Halcyon. If the shipowner is liable to an individual shoreworker because of his breach of the warranty of seaworthiness, there is no logical distinction which can be drawn between the shipowner's duty to furnish a seaworthy vessel to the

employees and the shipowner's duty to furnish a seaworthy vessel to the contractor. The employees are on board only as representatives of the contractor. The shipowner owes the same duty to the contractor as he does to the latter's employees. That warranty of seaworthiness was something upon which Haenn was entitled to rely just as was its employee, Baccile.

IV. The question of the circumstances under which contribution or indemnity may be sought where the injured party is the employee of a contractor performing work on board a vessel in navigable waters, has been the subject of much litigation.

There is confusion among the various Courts which have been confronted with the problem. That confusion seems to us to stem from the failure of the various Courts which have considered the problem to approach it correctly. Where the question is the right of contribution or indemnity, the Courts have failed to assess the underlying duties owed by one party to the other. They have confused the case of two actors acting in concert to produce an injury, with the case where one party had a right to rely upon the other party's fulfilling a duty which it owed to the first.

In *American Mutual Liability Ins. Company* v. *Matthews*, 182 F. 2nd 322, the Court of Appeals for the Second Circuit has indicated that there can be no duty owing by the contractor to the vessel. That Court has followed its own dictum in *Porello* v. *United States*, 153 F. 2nd 605 at 607 (reversed and remanded, 330 U. S. 446). That Court has taken the view that the right of contribution can accrue only when a common act has imposed a common liability upon them to the injured party. The Court of Appeals for the Second Circuit then concludes that since the Longshoremen's and Harbor Workers' Compensation Act wipes

out the injured employee's common law rights against his employer, that the two cannot be the subject of a common liability, and therefore there can be no contribution.

The Court of Appeals for the Ninth Circuit, in *United States* v. *Rothchild International Stevedoring Company*, 183 F. 2nd 91, has held that the act of two wrongdoers had to be joint and simultaneous in order to bring about contribution or a division of the damages, but that where the injury to the third person was brought about by independent acts of negligence, one of which supervenes in time, the consequences of the first did not include the consequences of the second.

Thus the decisions by three Courts of Appeal involving suits for contribution or indemnity have all been made to turn upon the Court's notion of the duty which the employer owed to the injured employee. Rightly, these claims for contribution or indemnity in which one defendant seeks recovery from another should all be made to depend upon the duties which the two defendants owed *inter se*.

It is respectfully submitted that the questions here are important. This Court has been asked to review a decision which grants contribution to a party primarily liable from a party who was but secondarily liable for the injury to the third person. That, in itself, is an innovation, but when this Court is asked to consider the amount of the recovery which may be obtained in an action against the injured party's employer, then this Court should examine the entire problem. If it is to be the rule that a party who fails to discover the defect in an appliance furnished by another is thereby jointly liable, then this Court should be the forum to enunciate that departure from heretofore established doctrine. Wherefore, Haenn prays that this Honorable Court may grant this petition for certiorari and, if certiorari be granted to Halcyon in No. 62 October

Term, 1951, then Haenn asks that this Court review the entire problem.

Respectfully submitted,

HAENN SHIP CEILING AND REFITTING CORPORATION,

By THOMAS E. BYRNE, JR.,

Counsel for Petitioner.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

I. Where It Is Impossible to Determine Upon Which of Two Theories the Jury Based Its Verdict, Is It Error for the Court of Appeals to Affirm When It Disregards One Theory and Examines Only the Other to Determine Whether There Is Substantial Evidence to Support Such a Verdict.

In the instant case the Trial Court told the jury that it could find Haenn liable upon either one of two distinct theories. Haenn would be liable, said the Court, if it was (1) negligent in failing to inspect the plank before sending Baccile down upon it, or (2) negligent in going about its work in an improper manner. However, the point stressed by Halcyon during the trial was Haenn's alleged negligence in failing to inspect. It was the Plaintiff's first requested instruction (138a) and the most specific basis of liability given to the jury in the charge (161a). Quite naturally it was this theory of recovery which Haenn attacked most strenuously on appeal. Haenn argued that, even assuming negligence had been established on its part in failing to inspect, under the doctrine of primary and secondary negligence it could not be forced to contribute. The Court of Appeals, while recognizing that there were two possible theories of recovery, disposed of Haenn's main argument with these words:

> "On review of the record we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn negligent, *not merely in failing to inspect*, but as well in failing to go about its work properly." (R. 185). (Emphasis ours.)

Since the doctrine of primary and secondary liability assumes that Haenn was negligent in failing to inspect but

still precludes the enforcement by Halcyon of contribution, it is obvious that the Court of Appeals in no manner examined or disposed of Haenn's contentions. The opinion of the Court of Appeals indicates that it took one of two possible approaches to the problem. Either it conceded that the first theory was wrong but permitted recovery because the second theory had support in the evidence; or finding support for recovery on one theory, it felt that it was unnecessary to examine the other. Yet under the verdict rendered, there was no way in which the Court below could ascertain upon which theory the jury came to its conclusion. It is submitted that either approach to the problem is incorrect. The Court of Appeals must pass on every possible theory of recovery, which is *bona fide* contested, to determine if it is erroneous, when from the verdict it is impossible to determine how the jury came to its conclusion. The Court of Appeals for the Fourth Circuit succinctly states the Federal rule in *Atlantic Coast Line* v. *Tiller*, 142 F. (2d) 718, 722 (1944) reversed on other grounds, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465:

> "Furthermore, since the verdict was general, it is impossible to say whether it was based upon the issue that was properly submitted to the jury or upon the issue that should have been withdrawn. The rule to be applied in such a situation is stated in *Stokes* v. *United States*, 8 Cir., 264 F. 18, 23, as follows: ' . . . A general verdict under an erroneous instruction cannot be upheld, when there were two theories submitted to the jury, on either of which they might have founded it, under one of which the instruction was harmless, while under the other it was error, because the generality of the verdict renders it impossible to determine upon which theory the jury based it. They may have founded it upon the very issue to which the erroneous instruction related, and that instruction may have controlled and produced their finding. *State*

> *of Maryland* v. *Baldwin*, 112 U. S. 490, 493 and S. Ct. 278, 28 L. Ed. 822; *Lyon, Potter & Co.* vs. *First Nat. Bank of Sioux City* (8 Cir.), 85 F. 120, 123, 29 C. C. A. 45, 48; *Durant Mining Co.* v. *Percy Consolidated Mining Co.* (8 Cir.), 93 F. 166, 169, 35 C. C. A. 252, 255; *St. Louis, Iron Mtn. & Southern Ry. Co.* v. *Needham* (8 Cir.), 63 F. 107, 114 11 C. C. A. 56, 63, 25 L. R. A. 833; *What Cheer Coal Co.* v. *Johnson* (8 Cir.), 56 F. 810, 813, 6 C. C. A. 148, 151; *Cresswell Ranch and Cattle Co.* v. *Martindale* (8 Cir.), 63 F. 84, 90, 11 C. C. A. 33, 39." See also *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708."

This Court first considered the question in *State of Maryland* v. *Baldwin*, 112 U. S. 490, 493, 5 S. Ct. 278, 28 L. Ed. 822. There the plaintiff, as an alleged heir, brought action on a bond of administrators of a decedent's estate. The administrators filed several pleas in defense, among which was a plea that the plaintiff was not an heir. The jury found a general verdict for the defendant. The opinion, by Mr. Justice Field, states:

> "On the trial evidence was introduced bearing upon all the issues, and, if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered but its generality prevents us from perceiving upon which plea they found. If therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."

The Court then proceeded to examine the instructions to the jury in light of the evidence as to the plea of the plaintiff not being an heir. Finding error in the submission of that issue to the jury, this Court reversed and remanded.

The issue again came up in a negligence action which was before this Court in *Wilmington Star Mining Co.* vs. *Minnie Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708 (1906). The action was for wrongful death which occurred in a mine explosion. The complaint set out eight separate counts of negligence. The jury returned a general verdict for the plaintiff. On review this Court found that, under the evidence, no recovery could have been predicated upon three of the eight counts submitted to the jury. It therefore reversed.

To the same effect are the cases from the various Courts of Appeal cited in our reasons for granting this petition. In *New York and Porto Rico Steamship Co.* v. *Garcia*, 16 F. (2d) 734 (CCA 1934), the Court found improper the joining of two different and separate causes of action, which in view of the fact that a general verdict was returned, necessitated a new trial since it could not be determined upon which of the counts the jury based the verdict—the verdict being excessive if liability was imposed on one of the counts.

In *Baltimore and Ohio R. Co.* v. *Deneen*, 161 F. (2d) 674 (CCA4 1947), the reviewing Court found certain counts defective, and reversed on the ground that, a general verdict being returned, failure to instruct that no recovery could be had on such counts was prejudicial error.

The Courts of Appeal for the Sixth and Eighth Circuits have followed the rule laid down in *Maryland* v. *Baldwin, supra;* in *Baltimore & Ohio R. Co.* v. *Reeves*, 10 F. (2d) 329 (CCA6 1926); *Lyon, Potter & Co.* v. *First Nat. Bank*, 85 F. (2d) 120 (CCA 1898); and *St. Louis, I. M. & S. Ry. Co.* v. *Needham*, 63 F. 107 (CCA8 1894).

The later cases, *Baltimore & O. R. Co.* v. *Deneen, supra*, and *Atlantic Coast Line* v. *Tiller, supra*, apparently found the law so well settled that it was unnecessary to cite the

basis for it, but the earlier cases dwell upon the fact that the reviewing court was in no position to determine from either the evidence or the verdict whether the jury imposed liability on the correct or erroneous theory. The defendant cannot be forced to defend upon a multitude of theories, have them all submitted to the jury, and then see the verdict upheld because one of the possible theories of recovery was sustained by the evidence. The burden upon the defendant becomes unreasonable. The defendant denies liability, as here, on one theory. He says even assuming I am negligent, the law precludes recovery under these facts. The Court disregards his objections, and pointing to another facet of the case says look—here is sufficient evidence to support the verdict. However, in no way can it tell which issue or issues led the jury to its determination. Every safeguard against confusion and surprise in the law militates against such a practice.

The Rules of Civil Procedure prescribed by this Court for the Federal District Courts impliedly recognize the argument we here make. Rule 49 provides for the use of special verdicts at the discretion of the Trial Judge. No special verdict was returned here. We submit that Rule 49 recognizes that where recovery is sought on several theories, the Trial Judge and the Reviewing Court must know the ground for the jury's verdict before it is possible to deal justly and intelligently with it. It is not an answer to say:

> "There was sufficient evidence upon which the jury could reasonably find Haenn negligent, not merely in failing to inspect, but as well in failing to go about its work properly." (Opinion R. 185.)

Suppose the jury did not believe from the conflicting evidence on the point, that Haenn had failed to go about its work properly. The jury might well have been im-

pressed with the evidence tending to show that Haenn did not make a proper inspection. If that is so, Haenn is but secondarily liable and the judgment below is wrong in requiring one secondarily liable to contribute with the party primarily liable.

There can be no doubt there was a violation of the Federal rule which prohibits the affirmance of a general verdict based on more than one theory, unless all the theories are correct. In failing to determine whether all theories supported the verdict, error was committed and we must examine the theories under which the case was submitted to determine whether such error was prejudicial.

II. *Where a Shipowner Is Responsible for the Creation and Maintaining of a Dangerous Condition Which Gives Rise to an Injury to an Employee of an Independent Contractor Hired by the Shipowner, Can the Shipowner Recover Contribution from the Employer on the Ground That the Employer Was Negligent in Failing to Inspect and Discover the Negligent Condition.*

The Trial Court in this case submitted to the jury as one theory of recovery, the possible negligence of Haenn arising out of its failure to inspect the staging before sending Baccile down upon it. We need hardly point out that negligence of itself does not give rise to a cause of action. It does so only when the negligence is the breach of duty. The question then resolves itself into whether a failure to rectify a dangerous condition can throw liability upon Haenn for contribution under the facts presented here.

The facts are simply these. The staging in question was already installed in the ship on its arrival at Philadelphia. It formed a semi-permanent part of the structure of the ship. Haenn was hired, for the purposes of this case, to retack the burlap in No. 2 hold. To do so it used the stag-

ing already in the hold. Before doing so it did not inspect. When Baccile went down on the staging it appeared solid, but gave way after he had been on it for a minute or two. Baccile recovered from the ship and the ship demanded contribution. We say this as an implicit foundation of our contentions:

> If Haenn could have recovered *full indemnity* from Halcyon for any expenses incurred by reason of the injury to Baccile, Halcyon cannot recover contribution in any amount.

The answer to whether Haenn could have recovered full indemnity lies in the determination of whether the doctrine of primary and secondary negligence applies to this maritime case. The doctrine was first laid down by this Court in *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316. There the Gas Company's employees left off a manhole cover in the public highway, thus creating a dangerous condition. A third party was injured and recovered a judgment against the District of Columbia on the ground that it failed to keep its streets in a safe condition. The District sued the Gas Company for indemnity. This Court permitted full indemnity. It held that as between the City and the Gas Company the negligence of the one creating the dangerous condition was primary and the negligence of the District in failing to discover and rectify the defect was but secondary.

This Court further defined primary and secondary liability in *Union Stock Yards Co.* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217. There railroad A received a car from a connecting railroad with a dangerously defective coupler. A did not own the car. A carelessly failed to inspect the coupler and delivered the car in the same condition to B, another railroad, which also negligently failed to inspect

the coupler. As a result of its defective condition C, employed by B, is hurt, and obtains a judgment against B which B satisfies. It was held that B was not entitled to indemnity, for since it did not own the car, its only negligence was its failure to inspect. This was the same as B's. Therefore the negligence of both being the same, the Court said one could not be called primary in relation to the other. Distinguishing *The Washington Gaslight Co.* case, *supra,* the Court said:

> "It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other."

The *Washington Gaslight Co.* case and the *Union Stock Yards Co.* case laid the basis for the doctrine of primary and secondary liability. In applying the doctrine to maritime law Judge A. Hand said in *The No. 34, Petition of L. Boyer's Sons Co.,* 25 F. 2nd 602:

> "Here the negligence of Boyer's lighterman against which he gave no warranty was the primary fault and Boyer must indemnify Hogan because Hogan's neglect to inspect and discover the insecurity of the ladder was a secondary fault which would have caused no damage if Boyer's lighterman had not originally installed it in an unsafe way."

For proof that the doctrine of primary and secondary negligence is not dead, see the Opinion of this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 at 89, where the doctrine is examined and laid aside as not applicable.

In any case where contribution or indemnity is the issue, it is necessary to examine the duties of the parties *inter se*. For the purposes of this petition we concede that Haenn owed Halcyon the duty to go about the work in a proper manner. We do not concede that Haenn owed Halcyon a duty to inspect the ship upon which it had been invited to bring its employees. Whether the theory of a warranty of seaworthiness, that of a business invitee, or that of a supplier of a chattel or a place to work be the one adopted, it is still very clear that Halcyon owed the duty to Haenn. It owed Haenn the duty to supply a seaworthy vessel, to use a high degree of care that its ship was safe for its business visitors, that the chattel it supplied was reasonably safe or that the place it supplied Haenn to perform the ship's work was reasonably safe. The duty is, of course, dependent upon the approach one takes to the problem. It had to be one such duty.

We concede that Haenn owed Baccile the duty to use reasonable care to furnish him with a safe place in which to work. But to say that because Haenn breached a duty which it owed to Baccile that it likewise breached a duty it owed to Halcyon is *non sequitur*. The duty ran the other way. Haenn's mere failure to discover Halcyon's breach of duty and protect Baccile from it, should not give rise to a cause of action by Halcyon against Haenn.

The correct doctrine permits a person who has been negligent in failing to discover and rectify a dangerous condition to obtain full indemnity from the party responsible for the creation of the condition. See *Restatement of Restitution*, § 95. Under the rule of the Restatement, the

person creating the dangerous condition, if he has been forced to pay damages because of injury to a third party, cannot enforce contribution from the one who was negligent merely in failing to inspect, discover, and rectify the danger so created.

The facts of the instant case show that Halcyon permitted the dangerous condition to arise either due to the damage to the feeder in Rotterdam or to some other unknown cause. The ship knew of the damage and failed to warn Haenn. With the staging in such condition it called upon Haenn to do work in the feeder. Haenn used the staging without first inspecting it. Even assuming such failure to inspect was evidence of negligence, Halcyon cannot demand contribution because it was primarily negligent in that through its negligence the dangerous condition was created. Therefore it was prejudicial error to submit the issue of the negligence of Haenn in failing to inspect as a basis of recovery.

Mention also might be made of the effect of this decision upon the doctrine of seaworthiness as laid down by your Honorable Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. There the Court held that the warranty of seaworthiness extended to a stevedore employee of an independent contractor engaged in unloading and loading. Since the *Sieracki* decision the lower courts have logically extended the warranty to cover the case of a shoreside carpenter injured on board the vessel by reason of a defect in one of its appliances. *Sulovitz* v. *United States*, 64 F. Supp. 637; *Eagle Indemnity Co.* v. *United States Lines Co.*, 86 F. Supp. 949; *Hawn* v. *Pope & Talbot, Inc., et al.* (Opinion of McGranery, Jr., D. C. E. D. Pa., filed 17 July 1951). It is submitted that the warranty of seaworthiness extends to the independent contractor, Haenn, as well as to its employee Baccile. This is the general rule as laid

down in *Harper, Law of Torts*, § 98 (1933 Ed.). Any other interpretation would be an undue restriction of the doctrine of seaworthiness which your Honorable Court has again and again said must be interpreted liberally. See *Seas Shipping Co.* v. *Sieracki, supra.* And since this warranty of seaworthiness extended to Haenn, Haenn had every reason to rely upon it and expect a seaworthy vessel had been supplied. It is submitted that in such a situation, the facts militate even more strongly to an application of the doctrine of primary and secondary negligence. *Boston Woven Hose & Rubber Co.* v. *Kendall*, 178 Mass. 232, 51 LRA 781, 59 N. E. 657; *Union Stock Yards Co., supra.*

III. *Where a Shipowner Supplies an Appliance to a Contractor to be Used Aboard Ship, Can the Shipowner Later Claim That Such Use Was Negligent and a Breach of Duty to Him so as to Enforce Contribution, When the Appliance Was Used in the Normal Manner?*

From our investigation, while the answer to this question is embodied in the *Restatement of Restitution*, § 93, and has been passed upon by many courts both in this Country and England, it has never been considered by your Honorable Court. Yet it is a question of great practical importance.

The question has and will arise in almost every case where a longshoreman sues a shipowner and alleges that an appliance or appurtenance of the ship was defective. The longshoreman-plaintiff usually makes out his case against the original defendant, the shipowner, by showing that some equipment belonging to the ship was furnished for his use by the shipowner, and failed in use, causing him injury. Under the doctrine of the decision in this case, the shipowner can obtain contribution or perhaps full indemnity by showing that the plaintiff's employer failed to inspect and discover the defect in the ship's equipment

which was supplied by the shipowner. The result is incompatible with many decided cases, including the following:

Keller Building Co. v. *E. H. Titchener & Co.*, 190 App. Div. 135, 179 N. Y. S. 344 (1919), where the plaintiff, a contractor, furnished to the defendant, a sub-contractor, a defective scaffolding which hurt a workman. By statute the plaintiff was liable to the workman and paid him. Held that he could not recover from the defendant;

Mallory S. S. Co. v. *Druban*, 17 Ala. App. 365, 84 So. 874 (1920), where defendant furnished a defective derrick for the plaintiff's use as a result of which plaintiff's employee was hurt and the plaintiff required to pay damage. Held plaintiff could recover indemnification from defendant;

Pennsylvania Company v. *Roberts and Schaefer Company*, 250 Ill. App. 330 (1928), defendant built a defective sanding plant for the plaintiff. It fell upon the plaintiff's employee. Held that the plaintiff is entitled to indemnity for the amount paid to the customer;

Pfarr v. *Standard Oil Co.*, 165 Iowa 657, 146 N. W. 851 (1914), where defendant carelessly sold gasoline as kerosene. The plaintiff resold it and became liable to its customers. Held that plaintiff is entitled to indemnity for the amount paid to the customer;

Busch & Latta Painting Co. v. *Woermann Construction Co.*, 310 Mo. 419, 276 S. W. 614 (1925), where defendant supplied a defective scaffold to the plaintiff. It collapsed in use causing the plaintiff to be liable to an employee. Held the plaintiff was entitled to full indemnity from the defendant for the amount paid to employee;

John Wanamaker, New York Inc. v. *Otis Elevator Co.*, 228 N. Y. 192, 126 N. E. 718 (1920), where a defective elevator installed by the defendant for the plaintiff caused harm to a business guest of the plaintiff. Held that plain-

tiff could recover full indemnity from the defendant for amount paid to business guest;

Miller v. *New York Oil Co.*, 34 Wyo. 272, 243 Pac. 118, (1926) where defendant negligently installed a gas heating apparatus in the plaintiff's house which asphyxiated a tenant of the plaintiff. Held plaintiff could recover full indemnity from the defendant;

Mowbray v. *Merryweather*, L. R. (1895) Q. B. 857, where the defendant supplied defective equipment to the plaintiff for unloading a ship and an employee of the plaintiff was hurt. Held plaintiff could recover full indemnity from the defendant.

The result which Haenn contends is the correct one has already a basis in prior decisions of your Honorable Court. In *Dair* v. *United States*, 16 Wall. 1, 21 L. Ed. 491, the Court said:

> "It is, accordingly, established doctrine that whenever an act is done or a statement made by a party, which cannot be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or omission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

This rule was followed by your Honorable Court in *Westinghouse Electric & Mfg. Co.* v. *Formica Insulation Co.*, 266 U. S. 342.

Halcyon as supplier here furnished the staging as part of the equipment of the ship. The staging had but one purpose, and it was used for that purpose. The ship knew of the use to which the staging was being put. Further the manner in which the staging was used was customary and normal. It would be *non sequitur* if the shipowner should now be permitted to contend that such use was a

negligent manner of going about the work and a breach of duty as to him.

This petition is conditional in that certiorari is not sought by Haenn unless this Court grants certiorari upon Halcyon's petition, No. 62, October Term, 1951. The reasons for that are practical rather than legal.

We urge that this Court would be operating *in vacuo* if it were to examine only the question of the extent of contribution. It should first promulgate the law as to when the right to contribution arises at all under maritime law.

We are not unmindful of the so-called "two court rule", but we suggest that there is such confusion of thought among the bench and bar on the subject of contribution that the rule loses force and should not be persuasive in the present situation. Solution of the problem of *when* contribution should be had should logically precede the answer to the problem of the amount of contribution. Proper solution of the first would make solution of the second unnecessary in our case as well as in many others.

Conclusion

The petition of Haenn for a writ of certiorari should be granted if Halcyon's petition (No. 62, October Term, 1951) is granted.

Respectfully submitted,

MARK D. ALSPACH,
THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

JOHN T. PHILLIPS,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 197.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Cross-Petitioner,

v.

HALCYON LINES AND VINKE AND COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR CROSS-PETITIONER.

MARK D. ALSPACH,
JOHN B. SHAW,
T. E. BYRNE, JR.,
Counsel for Cross-Petitioner.

KRUSEN, EVANS & SHAW,
Of Counsel.

INDEX TO BRIEF.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Summary and Statement of the Case	3
Factual History of the Case	3
History of the Litigation	7
Argument	10
I. Where the Instructions of the Trial Judge to the Jury Permit the Jury to Base Its General Verdict Upon Either One of Two Theories and One Theory Is Erroneous, Can a reviewing Court Sustain the Verdict Upon the Ground That There Was Evidence to Support Recovery Upon the Correct Theory and Therefore Was Not Required to Examine the Incorrect Instruction?	10
In the Case at Bar the Courts Below Have Allowed a Party Primarily Liable to Recover Contribution From a Party Whose Liability Is But Secondary. This Is Contrary to Heretofore Well Settled Legal Principles	16
Conclusion	27

TABLE OF CASES CITED.

	Page
Advanced Refrigeration Inc. v. United Motors Service, Inc., 26 S. E. (2) 789	20
Altadona v. United States, 91 F. Supp. 33	19, 23
American Mutual Liability Ins. Co. v. Matthews, 182 F. 2nd 322	27
Atlantic Coast Line v. Tiller, 142 F. 2nd 718 (1944), reversed on other grounds, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465	11
Baltimore and Ohio R. Co. v. Deneen, 161 F. 2nd 674 (CCA 4, 1947)	13
Baltimore and Ohio R. Co. v. Reeves, 10 F. 2nd 329 (CCA 6, 1926)	13
Boston Woven Hose & Rubber Co. v. Kendall, 59 N. E. 657 (Mass.)	19
Bruszewski v. Isthmian Steamship Company, 163 Fed. 2d 720	15
Busch and Latta Painting Co. v. Woerman Construction Co., 310 Mo. 419	21
Doyle, Administratrix v. Atlantic Refining Co., 357 Pa. 92	15
Fauntleroy v. Argonaut S. S. Line, 27 F. 2d 50	19
Fidelity and Casualty Co. of New York v. Federal Express, 163 F. 2d 35	21
Fuller Co. v. Otis Elevator Co., 245 U. S. 489	26.
Fulton Gas and Electric Co. v. Hudson River Telephone Co., 114 N. Y. S. 644; affirmed 200 N. Y. 287	21
George's Radio v. Capital Transit Co., 126 F. 2nd 219	23, 26
Grasso v. Lorentzen, 149 F. 2nd 127	23
Gray v. Boston Gaslight Co., 114 Mass. 149	21
Hook v. National Brick Co., 150 Fed. 2d 184	15
Hudson Valley Ry. Co. v. Mechanicsville Electric Light and Gas Co., 167 N. Y. S. 428	21
The Lewis Luckenbach, 207 F. 66	18

TABLE OF CASES CITED (Continued).

	Page
Lyon, Potter & Co. v. First National Bank, 85 F. 120 (CCA 8, 1898)	13
Mallory SS Co. v. Druham (Ala.), 84 So. 874	21
Manning Mfg. Co. v. Hartol Products Corp., 99 F. 2d 813	21
McKenna v. Austin, 134 F. 2nd 659	16
Merryweather v. Nixan, 8 T. R. 186 (K. B. 1799)	16
Mowbray v. Merriweather, 2 Q. B. 640	17
Mowery v. Johnson, 69 F. Supp. 755 (DC, ED, PA 1946)	13
New York & Porto Rico Steamship Co. v. Garcia, 16 F. 2nd 734 (CCA 1, 1934)	13
Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola, 134 N. Y. 461	26
Otis Elevator Co. v. Maryland Casualty (Colo.), 33 Pac. (2) 974	20
D. M. Picton & Co. v. Eastes, 160 F. 2d 189	19
Reymer v. Consolidated Ice Co., 67 Pa. Supp. 468	21
St. Louis I. M. & S. Ry. Co. v. Needham, 63 F. 107 (CCA 8, 1894)	13
The S. S. Samovar, 72 F. Supp. 574	19
Seas Shipping Co. v. Sieracki, 328 U. S. 85	2, 21, 22
Sorrentino v. Graziano, 341 Pa. 113	24
Standard Oil Co. v. Robbins Drydock & Repair Co., 32 F. 2nd 182	18
State of Maryland v. Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. Ed. 822	12
Sulovitz v. United States, 64 F. Supp. 637	21
Union Stock Yards Co. v. Chicago, R. & Q. R. R. Co., 196 U. S. 217	26
Washington Gaslight Co. v. District of Columbia, 161 U. S. 316	26
Wilmington Star Mining Co. v. Minnie Fulton, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708 (1906)	13

STATUTES AND AUTHORITIES CITED.

	Page
A. L. I. Restatement of the Law of Restitution, Section 95	19
A. L. I. Restatement of The Law of Restitution, § 93	24
A. L. I. Restatement of Torts, Sec. 300, comment C	15
140 A. L. R. 1301	21
Leflar, Contribution and Indemnity between Tort Feasors, 81 Pa. L. R. 130 (1932)	16
Longshoremen's & Harbor Workers' Compensation Act, Sec. 5, 33 U. S. C. A. 905	7, 9
Prosser Torts (1941) § 109	16
Rules of Civil Procedure, Rule 49	14
United States Code, Title 28, Sections 1254(1) and 2101(c)	2
2 Williston Contracts (1936) § 338a	16

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 197.

HAENN SHIP CEILING AND REFITTING CORPORATION,

Cross-Petitioner.

v.

HALCYON LINES AND VINKE AND COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF CROSS-PETITIONER, HAENN SHIP CEILING AND REFITTING CORPORATION, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The Opinion of the United States District Court for the Eastern District of Pennsylvania denying Petitioner's motion for judgment notwithstanding the verdict and for a new trial is reported 89 F. Supp. 765, and appears in the record commencing at page 221.

The Opinion of the United States Court of Appeals for the Third Circuit is reported 187 F. 2nd 403, and appears in the record commencing at page 229.

JURISDICTION.

The jurisdiction of this Court to entertain this Petition is provided by Sections 1254(1) and 2101(c) of Title 28, United States Code.

QUESTIONS PRESENTED.

1. Where the instructions of the Trial Judge to the jury permit the jury to base its general verdict upon either one of two theories and one theory is erroneous, can a reviewing Court sustain the verdict upon the ground that there was evidence to support recovery upon the correct theory and therefore was not required to examine the incorrect instruction?

2. Where a shipowner furnishes the employees of a shoreside contractor with an appliance which fails in normal use, can the shipowner who has been sued by the injured employee recover contribution from the plaintiff's employer upon the ground that the employer was negligent in failing to inspect the appliance which the shipowner furnished and discover the defective condition which brought about the accident and injury to the additional defendant's employee?

3. Where a shipowner supplies an appliance to a contractor which is used in a normal manner, can the shipowner later claim that such use was negligent and a breach of duty to him?

4. Is the warranty of seaworthiness which a shipowner owes to a stevedore injured on board his vessel (*Seas Shipping Company v. Sieracki*, 328 U. S. 85) likewise owed to the employer of a shoreside carpenter who comes aboard the vessel for the purpose of making it ready to receive cargo?

SUMMARY AND STATEMENT OF THE CASE.

Factual History of the Case.

For brevity we shall throughout this brief refer to the original plaintiff as "Baccile," the original defendant as "Halcyon" and the third-party defendant as "Haenn."

Halcyon owned and operated the Dutch Steamship "Stad Vlaardingen." Prior to the voyage in question the vessel had sailed from Montreal to Rotterdam with a cargo of grain in bulk. In order to carry grain in bulk there was installed on the vessel equipment known as grain fittings. This installation was made at Montreal during October, 1946.

The nature of bulk grain is such that when it is loaded into a vessel it is loose, and when a vessel is at sea the motion or "working" of the vessel causes the grain to settle. The "Stad Vlaardingen" had large lower holds and a smaller space between the lower hold and the main deck. This space, known as the "'tween deck", was not utilized to carry bulk grain.

Because the grain in the lower hold does not always settle evenly and may shift with the roll of the ship it is necessary that the lower hold be kept full at all times so that the vessel's stability will not be affected. This is accomplished by erecting what is known as a grain feeder. This is nothing more than a four sided box, open at the top and bottom. It extends from the main deck to the top of the lower hold. When the lower hold is filled with grain the feeder is also filled. As the grain in the lower hold "works" and settles, the grain in the feeder feeds down and fills the spaces in the lower hold, thus keeping that space evenly loaded at all times during the voyage.

The grain feeder installed in the "Stad Vlaardingen" at Montreal (R. 110-112) was 10 feet high, 28 feet across or athwartship, and 8 feet fore and aft. It was constructed of rough planks running vertically. In order to seal the cracks between the planks burlap was draped inside the feeder.

When the feeder was built, stage planks were inserted near the bottom. These formed a scaffolding inside the feeder and upon these planks worked the men who built the feeder. These planks were left inside the feeder after its construction was finished so that they might be used by others who might at a later time find it necessary to work inside the feeder (R. 116).

There were six feeders, each leading to one of the six sections into which the lower hold of the "Stad Vlaardingen" was divided.

After the feeder was constructed at Montreal the vessel was loaded with grain, which it carried to Rotterdam. Apparently during the discharge operation there at least some parts of the grain fittings on the "Stad Vlaardingen" were damaged (R. 43, 44, 56 and 57).

On November 25, 1946, the "Stad Vlaardingen" arrived at Philadelphia. Haenn is a shoreside company at Philadelphia which is engaged in the work of repairing and refitting grain feeders and similar equipment in ships, principally those engaged in the grain trade. The Philadelphia agent for Halcyon notified Haenn that the "Stad Vlaardingen" would arrive and that some refitting and repairs would be required to the grain fittings already installed. The agent telephoned Haenn and in accordance with past dealings it was understood that the work would be performed on a time and material plus fixed fee basis. One of Haenn's supervisors went on board the vessel where he met her chief officer and a man named Campbell, who was an inspector for the Underwriters insuring the grain. The grain fittings had to be repaired and refitted as ordered by this inspector (R. 62).

We have pointed out above that there were six grain feeders on the vessel. In addition there was a temporary vertical wooden bulkhead known as a "shifting board" which ran fore and aft at the center line of each lower hold. As the three men, Knopf, representing Haenn, the chief mate representing the ship, and Campbell representing the

New York Board of Underwriters (R. 100), went around the ship, certain items to be corrected were pointed out. It is important to bear in mind that with respect to the feeder in question, the only work which Haenn was directed to do was to refasten the burlap draped inside the feeder (R. 45, 70, 79, 83). It had apparently been torn loose from its original fastenings during the loading at Montreal or the unloading at Rotterdam. It is also important to bear in mind that in the bottom of each of the feeders were stage planks similar to the one which plays such an important part in the factual background of the present case.

Haenn's employees, including the original plaintiff, Baccile, boarded the "'Stad Vlaardingen" at 1:00 P. M. on November 25. The Haenn employees were divided into four groups, each under a sub-foreman. Some were to work in the lower holds repairing the shifting bulkhead. The group of which Baccile was one went to the grain feeder at the No. 4 hatch and worked there until about 4:00 P. M. It is interesting to note that when Baccile was working on the grain feeder at the No. 4 hatch before he went to the one where he sustained his injuries, he stood on exactly the same type of stage plank as the one which later gave way and caused his injuries when he was working at the No. 2 feeder (R. 122-124). It is also a fact that before the accident at least one of the ship's officers saw Haenn's men so utilizing the planks (R. 102, 105).

About 4:00 P. M. Rickert, one of the sub-foremen, and Baccile left the feeder at the No. 4 hatch and went to the feeder at the No. 2 hatch. The only order for work at the No. 2 hatch had been to refasten the burlap (R. 45, 70, 79, 83).

Each feeder was divided in half by boards running vertically fore and aft at the center line. When Baccile and his Foreman Rickerts went to the No. 2 feeder, they twice utilized the boards at the bottom on one side as a place upon which to work, Baccile going inside the feeder and Rickerts standing on deck to steady the ladder and lower tools and

material to Baccile. Baccile then returned to the main deck, the two lowered the ladder into the other side of the feeder.

In accordance with longstanding custom, the ladder was lowered so that it rested on the stage plank at the bottom of the No. 2 feeder. It was this plank which later gave way.

The ladder then was used by Baccile and Rickert to tap the plank upon the theory that an unsound plank gives forth a different sound upon percussion than does a sound plank (R. 125). The plank in question passed this test and the bottom rung of the ladder was placed upon it. Baccile went down the ladder, stepped onto the plank, and walked along the plank to a corner where the burlap was torn away at a corner of the feeder. The burlap hung down so that it obscured the end of the plank where it was fastened to the side of the feeder. Standing on the plank, Baccile ascertained what materials he would need to refasten the burlap. As he was standing there and calling up requests for material he felt the plank "give" under him. He attempted to reach the end of the ladder but before he got to it, the end of the plank gave way at the point where it was fastened to the side of the feeder. Baccile fell to the bottom of the lower hold and was seriously injured.

The record is barren of any explanation for the failure of the plank to support the weight upon it. There is no evidence which would permit a finding or an inference as to whether, for instance, the plank had been insecurely nailed, whether the nails were originally or had become defective, or whether the nails had been improperly inserted; or whether the wood adjacent to the nails, either in the plank or in the supporting wooden members, had deteriorated so as to permit the nails to work loose. By the same token, there is no evidence as to whether a visual inspection, even a close inspection, would have revealed the defect, whatever it may have been, which permitted the end of the plank to give way.

For a consideration of Haenn's argument it is necessary to know that it is the practice that grain feeders similar to the one here in question are *always* fitted with stage planks at the bottom and that workmen coming aboard to make alterations or minor repairs to the feeders *always* utilize these planks as the only available practical platform from which their work can be done (R. 129).

History of the Litigation.

On October 7, 1947 Baccile sued Halcyon. The charging portions of his Complaint (R. 7a) allege that *Halcyon* failed to provide him with a reasonably safe place in which to work and provided him with a dangerous and unseaworthy place in which to work on board its vessel.

Not until April, 1948 did Halcyon file its third-party Complaint against Haenn. It is important to note that the charging portions of the Third-party Complaint allege that Haenn failed to inspect the staging, subjected it to an unusual strain and failed to provide for Baccile's safety (R. 14, 15).

Although the Halcyon Third-Party Complaint against Haenn lists eight specifications of alleged negligence on the part of Haenn (Third-Party Complaint, Paragraph 7, R. 14-15) there was no evidence introduced in support of the averments of subsections (a), (b), (d) and (h).

When Haenn answered the Third-Party Complaint it denied negligence and breach of duty owing to Halcyon and pleaded as a separate defense its immunity from suit by Halcyon by reason of the provisions of Sec. 5 of the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. 905. It is here conceded that Haenn has fulfilled the requirements of the Act with respect to procuring insurance *to secure its liability to Baccile under that Act.*

After various motions, one of which resulted in the preliminary decision with respect to paragraph 7 of the

Complaint (R. 40) the case was called for trial on November 21, 1949. By agreement of the parties Baccile's case was settled by Halcyon and judgment was entered in favor of the plaintiff and against Halcyon in the sum of $65,000.00. Halcyon then proceeded to try the issues framed by its third-party complaint against Haenn.

The attention of the Court is invited to the fact that Halcyon's original third-party complaint sought indemnity but that by stipulation, the third-party complaint was amended; the claim for indemnity was stricken out, and Halcyon alleged that Haenn was jointly liable with it to Baccile and should be required to contribute to Baccile's damages. The amended third-party complaint concluded with a demand for contribution from Haenn "in the event that [Halcyon and Haenn] are found to be jointly negligent in the premises . . ."

When the case was tried the District Judge submitted the issues as between Halcyon and Haenn to the jury under instructions which would have permitted a finding against Haenn upon either one of two theories. The two theories are probably most succinctly stated in the Opinion of the Court of Appeals in the following sentence:

> "On a review of the record, we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn negligent, not merely in failing to inspect, but as well in failing to go about its work properly." (R. 231.)

With the case before the jury under instructions which would have permitted a verdict against Haenn either on the theory that it had failed to inspect the planking before permitting Baccile to use it, or that Haenn would be liable as well if it had failed to go about its work properly, a general verdict was returned. In addition to its general verdict the jury found that Haenn was negligent so as to contribute to Baccile's injury to the extent of 75% and that Halcyon had contributed 25%.

Thereafter, Haenn filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. In the event these were denied, it filed a motion to mold the verdict so that if any judgment was entered against Haenn, it would not exceed 50% of the amount for which Baccile's case had been settled by Halcyon.

The District Judge denied Haenn's motion for judgment notwithstanding the verdict and for a new trial but did mold the verdict so that he entered judgment in favor of Halcyon and against Haenn for $32,500.00.

Both Halcyon and Haenn appealed, Halcyon on the ground that the verdict should not have been molded and Haenn on the ground that judgment should have been entered in its favor notwithstanding the verdict.

The Court of Appeals indicated that although the case against Haenn had been submitted to the jury upon alternative grounds of liability it did not have to examine one of them because there was evidence to support the verdict upon the other ground. It therefore affirmed the judgment against Haenn but modified it so that Halcyon's judgment against Haenn was limited by the amount of compensation which Haenn would have been required to pay its employee Baccile under the Longshoremen's & Harbor Workers' Compensation Act.

Both Haenn and Halcyon filed petitions for certiorari and this Court has granted them.

ARGUMENT.

I. Where the Instructions of the Trial Judge to the Jury Permit the Jury to Base Its General Verdict Upon Either One of Two Theories and One Theory Is Erroneous, Can a Reviewing Court Sustain the Verdict Upon the Ground That There Was Evidence to Support Recovery Upon the Correct Theory and Therefore Was Not Required to Examine the Incorrect Instruction?

In the instant case the Trial Judge told the Jury that it could find Haenn liable upon either of two theories. Haenn would be liable, said the Court, if it was (1) negligent in failing to inspect the plank before sending its employee Baccile down upon it, or (2) negligent in going about its work in an improper manner. However, the theory of liability stressed by Halcyon during the trial was Haenn's alleged negligence in failing to inspect. This theory was Halcyon's first requested instruction (138a) and the most specific basis of liability submitted to the Jury in the charge (161a).

Quite naturally, it was the theory of recovery based upon failure to inspect which Haenn attacked most vigorously on appeal. Haenn's attack upon this theory was twofold. First of all, Haenn argued that there was no evidence whatever to support a finding that an inspection would have revealed the defective condition which caused Baccile's injuries. Secondly, Haenn argued at length that even if negligence on its part had been established in failing to inspect, nevertheless under a doctrine of primary and secondary liability, it could not be forced to contribute to Halcyon.

The Court of Appeals, while recognizing that there were two possible theories of recovery in the case, summarily disposed of the foregoing arguments with these words:

"On review of the record we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn negligent, *not merely in failing to inspect*, but as well in failing to go about its work properly." (R. 185) (Emphasis ours.)

Since under the doctrine of primary and secondary liability it could be assumed that Haenn was negligent in failing to inspect, but such negligence would not permit enforcement by Halcyon of contribution, it is obvious that the Court of Appeals in no manner examined or disposed of Haenn's contentions. The Court of Appeals either conceded that the theory first mentioned was wrong but permitted recovery because the second theory had support in the evidence; or finding support for recovery on one theory, it felt that it was unnecessary to examine the other. However, under the verdict rendered, there was no way of ascertaining upon which theory the Jury reached its conclusion. It is submitted that either approach to the problem is incorrect.

The Court of Appeals must pass upon every possible theory of recovery which is bona fide contested, to determine if it is erroneous, when as here it is impossible to determine from the verdict how the Jury reached its conclusion. The Court of Appeals for the Fourth Circuit succinctly states the Federal rule in *Atlantic Coast Line v. Tiller*, 142 F. 2nd 718, 722 (1944), reversed on other grounds, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465:

"Furthermore, since the verdict was general, it is impossible to say whether it was based upon the issue that was properly submitted to the jury or upon the issue that should have been withdrawn. The rule to be applied in such a situation is stated in *Stokes v. United States*, 8 Cir., 264 F. 18, 23, as follows: '. . . A general verdict under an erroneous instruction cannot be upheld, when there were two theories submitted to the jury, on either of which they might

have founded it, under one of which the instruction was harmless, while under the other it was error, because the generality of the verdict renders it impossible to determine upon which theory the jury based it. They may have founded it upon the very issue to which the erroneous instruction related, and that instruction may have controlled and produced their finding. *State of Maryland v. Baldwin*, 112 U. S. 490, 493 and S. Ct. 278, 28 L. Ed. 822; *Lyon, Potter & Co. v. First National Bank of Sioux City* (8 Cir.), 85 F. 120, 123, 29 C. C. A. 45, 48; *Durant Mining Co. v. Percy Consolidated Mining Co.* (8 Cir.), 93 F. 166, 169, 35 C. C. A. 252, 255; *St. Louis, Iron Mtn. & Southern Ry. Co. v. Needham* (8 Cir.), 63 F. 107, 114 11 C. C. A. 56, 63, 25 L. R. A. 833; *What Cheer Coal Co. v. Johnson* (8 Cir.), 56 F. 810, 813, 6 C. C. A. 148, 151; *Cresswell Ranch and Cattle Co. v. Martindale* (8 Cir.), 63 F. 84, 90, 11 C. C. A. 33, 89.' See also *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708."

This Court first considered the question in *State of Maryland v. Baldwin*, 112 U. S. 490, 493, 5 S. Ct. 278, 28 L. Ed. 822. There the plaintiff, as an alleged heir, brought action on a bond of administrators of a decedent's estate. The administrators filed several pleas in defense, among which was a plea that the plaintiff was not an heir. The jury found a general verdict for the defendant. The opinion, by Mr. Justice Field, states:

"On the trial evidence was introduced bearing upon all the issues, and, if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered but its generality prevents us from perceiving upon which plea they found. If therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the in-

The Court then proceeded to examine the instructions to the jury in light of the evidence as to the plea of the plaintiff not being an heir. Finding error in the submission of that issue to the jury, this Court reversed and remanded.

The issue again came up in a negligence action which was before this Court in *Wilmington Star Mining Co. v. Minnie Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708 (1906). The action was for wrongful death which occurred in a mine explosion. The complaint set out eight separate counts of negligence. The jury returned a general verdict for the plaintiff. On review this Court found that, under the evidence, no recovery could have been predicated upon three of the eight counts submitted to the jury. It therefore reversed.

To the same effect are a host of cases from the lower Federal Courts: *New York & Porto Rico Steamship Co. v. Garcia*, 16 F. 2nd 734 (CCA 1, 1934); *Baltimore and Ohio R. Co. v. Deneen*, 161 F. 2nd 674 (CCA 4, 1947); *Baltimore and Ohio R. Co. v. Reeves*, 10 F. 2nd 329 (CCA 6, 1926); *Lyon, Potter & Co. v. First National Bank*, 85 F. 120 (CCA 8, 1898); *St. Louis I. M. & S. Ry. Co. v. Needham*, 63 F. 107 (CCA 8, 1894); *Nowery v. Johnson*, 69 F. Supp. 755 (DC, ED, PA 1946).

These cases are premised upon the proposition that a reviewing court is in no position to determine, either from the evidence or from the verdict, whether the jury imposed liability upon a correct theory or upon an erroneous one. That being so, a party cannot be forced to defend upon a multitude of theories and then see a verdict upheld because one of the possible theories of recovery submitted to the jury was sustained by the evidence. Yet that is precisely what occurred in the present case. Here Haenn denied liability, inter alia, upon the theory of its failure to inspect, and further denied that even if its negligence in this respect were assumed, it would give rise to a right to contribution on the part of Halcyon. The Court of Appeals disregarded this two-fold denial in its entirety, and

addressed itself solely to another facet of the case—Haenn's "failing to go about its work properly"—which, in the Court's Opinion would support the verdict.

Every consideration against confusion and surprise in litigation militates against the practice adopted by the Court of Appeals. The Rules of Civil Procedure prescribed by this Court for the United States District Courts impliedly recognize the argument we here make. Although no special verdict was returned here, Rule 49 provides for the use of special verdicts at the discretion of the Trial Judge. We submit that it is implicit in Rule 49 that where recovery is sought upon several theories, the Trial Judge and the reviewing court must know the ground for the jury's verdict before it is possible to deal justly and intelligently with it.

The failure of the Court of Appeals to examine Haenn's contentions goes to the very heart of this case. As we shall argue at some length in the following section of this Brief, even if Haenn were found to have been negligent in failing to inspect, its negligence in this respect would not give rise to a right to contribution on the part of Halcyon. *What is more fundamental, however, is that there is no evidence in the record to support the legal conclusion of liability of any sort on the part of Haenn, arising from any failure to inspect on its part.* We say this for one simple, yet abundantly sufficient reason: there was no evidence that an inspection, whether superficial or thorough, would have revealed the defect which subsequently caused or permitted Baccile to be precipitated into the lower hold. In other words, Halcyon never established any causal connection between the alleged failure to inspect and the ensuing accident.

All that the evidence establishes is that the end of the plank gave way. At best, this fact alone may give rise to legitimate speculation as to the reason for its giving way, but speculation is not sufficient to establish causal connection. It was Halcyon's burden to establish the causal

connection between the failure to inspect and the casualty, and the undisputed facts of this case indicate clearly that this burden was not met. As a matter of fact, it was not even approached.

That Halcyon cannot prevail, under the foregoing circumstances, upon any theory of Haenn's failure to inspect is amply supported by the authorities. Indeed, the proposition is so fundamental and so obvious that one could not reasonably expect to find it controverted frequently. The principle found apt expression in *Bruszewski v. Isthmian Steamship Company*, 163 Fed. 2d 720, where the Court said (at 163 Fed. 2d 722):

> "The difficulty with this argument [perhaps an inspection might have disclosed a defect] is that Plaintiff introduced no proof that, under the circumstances, it would have been reasonable to send somebody aloft to make a comprehensive inspection of the rigging, *or that such inspection would have revealed the danger presented by the block.*" (Emphasis ours.)

To the same effect are *Hook v. National Brick Co.*, 150 Fed. 2d 184, and *Doyle, Administratrix v. Atlantic Refining Co.*, 357 Pa. 92, 98. The American Law Institute, *Restatement of Torts*, Sec. 300, comment C, likewise adopts this principle in the following words:

> ". . . A failure to make an inspection does not create liability unless the inspection, if made, would have disclosed the particular defect which makes the use harmful to the other. . . ."

Since the jury in the case at bar was permitted to find liability against Haenn by reason of its alleged failure to inspect, and it is impossible on the state of the record to determine whether or not liability was founded upon that theory, upon the foregoing authorities the verdict against Haenn should not have been permitted to stand. In ignoring Halcyon's failure to prove any causal connection be-

tween Haenn's alleged failure in this respect and the accident, the Court of Appeals erred in affirming the judgment without examining Haenn's contention with respect to this basic infirmity in *Halcyon's* case.

In the Case at Bar the Courts Below Have Allowed a Party Primarily Liable to Recover Contribution From a Party Whose Liability Is But Secondary. This Is Contrary to Heretofore Well Settled Legal Principles.

Before commencing our main argument we would state certain precepts which we regard as fundamental.

An act which the law may classify as negligence does not *always* give rise to a legally *enforceable* cause of action. It does so only when the negligence constitutes the breach of a legal duty which one party, the defendant, owes to the other party, the plaintiff.

Contribution by its very nature runs between parties who are in pari delicto, i.e., whose negligent breach of duty toward the third party is of the same class, either both are primarily liable or both secondarily liable.

Indemnity is enforceable between parties whose liability is of a different class but the person primarily liable is entitled to recover neither contribution nor indemnity from the party whose negligence has been but a secondary cause of the injury to the third party.

Although the old Common Law first stated the rule that there could be no contribution, between "joint tort feasors",[1] and followed the rule of *Merryweather v. Nixan*,[2] that rule has now been modified to the point where contribution is the rule rather than the exception.[3]

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1. The term is inaccurate since "It is a first principle that liability in tort is several, not joint, however many may participate in inflicting the wrong and whether they act separately or in conjunction". McKenna v. Austin, 134 F. 2nd 659 at 622; Prosser Torts (1941) § 109; 2 Williston, Contracts (1936) § 338a.

2. 8 T.R. 186 (K.B. 1799).

3. Leflar, Contribution and Indemnity between Tort Feasors, 81 Pa. L. R. 130 (1932).

Much confusion has resulted from the failure to distinguish between contribution and indemnity. The foundation of Haenn's position before this Court is:

> If Haenn could have recovered full indemnity from Halcyon for all expenses incurred by it as the result of the injury to Baccile, then Halcyon cannot recover contribution in any amount. Under the fact, this case is clearly one where Haenn could have recovered indemnity if it had sought to do so and therefore Halcyon should not have judgment against Haenn in any amount.

We will proceed to demonstrate our thesis.

The well considered cases in the Maritime and Common Law of both England and the United States recognize the separate and mutually exclusive principles. In *Mowbray v. Merriweather*,[4] the plaintiff, a firm of contracting stevedores, agreed to discharge cargo from the defendant's vessel. The defendant was to supply chains for hoisting. One chain was defective, broke and injured an employee of the stevedore. The workman brought suit against his employer which settled and then sued the defendant-shipowner for indemnity. There was evidence that the defect in the chain could have been discovered by the stevedore upon an inspection. The Court granted the stevedore full indemnity and this was affirmed. The Court held that as between the plaintiff and the defendant the stevedore did not owe the vessel owner a duty to inspect the chain which the shipowner supplied. The Court recognized that as between the employer and the employee there was a duty to inspect and it was this which gave rise to the right of action which the injured workman had settled with his employer. The fact that the stevedore owed the duty of inspection to its employee did not mean that the same duty of inspection was owed to the shipowner by the employer. The stevedore was justified in relying upon the shipowner

4. 2 Q. B. 640.

to perform the latter's duty toward him and supply a chain proper for the use which both parties understood the chain would be put.

Standard Oil Co. v. Robbins Drydock & Repair Co.,[5] is one of many examples of the right to indemnity in the Maritime Law of the United States. A seaman employed by Standard had sued it by reason of injuries he sustained while proceeding from the deck of his vessel in drydock to the edge of the drydock. The gangway, owned and maintained by the drydock company, was defective. The seaman recovered against Standard, his employer, upon the ground that Standard had been negligent in failing to inspect and remedy the defective condition of the gangway furnished by the drydock company for the use of Standard's employees. Having paid the judgment against it, Standard sought and recovered full indemnity from the drydock company upon the principle that as between Standard and the drydock company, Standard's liability to the injured party was but secondary to the primary liability of the Drydock Company.

In the *No. 34*, 25 F. 2d 602, the Court of Appeals for the Second Circuit was dealing with a suit for indemnity by an employer for indemnification for the amount which he had paid one of his employees. The employee had been injured while using a ladder furnished the stevedores by the ship. The Court said:

> "If Boyer, as between himself and Hogan, was obliged to provide safe access to the lighter for Hogan's men, it cannot be doubted that Boyer was primarily liable and that Hogan (the employer) was entitled to full indemnity for the amount he had to pay by reason of Boyer's neglect".

For other maritime cases similarly recognizing the principle, see *The Lewis Luckenbach*, 207 F. 66; *Fauntleroy*

5. 32 F. 2nd 182.

v. Argonaut S. S. Line, 27 F. 2d 50; *The S. S. Samovar*, 72 F. Supp. 564; *Altadona v. United States*, 91 F. Supp. 33; and *D. M. Picton & Co. v. Eastes*, 160 F. 2d 189.

The principle pervades the law of torts. Section 95 of the *A. L. I. Restatement of the Law of Restitution*, provides:

> "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition."

Numerous courts, state and federal, apply the rule in non-marftime cases. In *Boston Woven Hose & Rubber Co. v. Kendall*,[6] the suit was by an employer against the defendant who had installed a boiler in the defendant's factory. The boiler exploded because improperly installed. Employees of the plaintiff were injured. The plaintiff was sued by the employees upon the ground that it had failed to properly inspect and discover defects in the boiler which the defendant had installed. After settling with his employees, the plaintiff sued the defendant. Mr. Justice Holmes, then Chief Justice of the Supreme Court of Massachusetts, upheld the right of indemnity and said:

> ". . . Although (plaintiff was) . . . negligent as toward its servants it had shown all of the care which the defendants had a right to expect".
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> "The fact that the reliance (by the plaintiff upon the defendant) was not justified as towards the men

6. 59 N. E. 657 (Mass.).

(the injured employees) does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced . . .".

Otis Elevator Co. v. Maryland Casualty[7] was a case where the original cause of action arose by reason of the falling of an elevator in an office building. Maryland Casualty Company was the insurer of the building. Otis had installed and maintained the elevators defectively. The injured passengers sued on the ground that the building owner was negligent in failing to inspect and discover the defect. The passengers recovered against the building owner and the latter's insurer sued Otis and recovered. The Court said "The failure to inspect would have caused no damage without a primary cause".

Advanced Refrigeration Inc. v. United Motors Service, Inc.[8] was likewise a case where the right to indemnity was upheld. The plaintiff, Advanced, had removed refrigeration equipment and, finding that the difficulty was in the electric motor, turned it over to the defendant, United Motors Service, Inc., for repairs. The latter repaired the motor improperly, redelivered it to Advanced, and the latter installed it in a home. Because of the defective repairs, the house caught fire and the property owner sued and recovered a judgment against Advanced on the theory that, although Advanced had not performed the repair work, it had failed to properly inspect the motor before installing it. Advanced paid the judgment and sued United for indemnity. The Court held that Advanced was entitled to indemnity because Advanced had originally been held liable by reason of its failure to inspect and had not been negligent in any positive or creative way so as to contribute to the eventual harm. The Court said:

"... Courts make a difference between negligence in omission or failure to make proper inspection,

7. (Colo.) 33 Pac. (2) 974.
8. (Ga.) 26 S. E. (2) 789.

and negligence in the performance of positive and creative acts, *as where one creates or maintains the unsafe or dangerous thing causing the injury.*" (emphasis ours.)

There are hosts of other cases both maritime and non-maritime, decided by both state and federal courts. We here cite but a few of them.

Gray v. Boston Gaslight Co., 114 Mass. 149;
Hudson Valley Ry. Co. v. Mechanicsville Electric Light and Gas Co., 167 N. Y. S. 428;
Fulton Gas and Electric Co. v. Hudson River Telephone Co., 114 N. Y. S. 644; affirmed 200 N. Y. 287;
Mallory SS Co. v. Druham, (Ala.) 84 So. 874;
Busch and Latta Painting Co. v. Woerman Construction Co., 310 Mo. 419;
Reymer v. Consolidated Ice Co., 67 Pa. Sup. 468;
Fidelity and Casualty Co. of New York v. Federal Express, ~~163~~ 136 F. 2d 35;
Manning Mfg. Co. v. Hartol Products Corp., 99 F. 2d 813.

See cases collected 140 A. L. R. 1301.

Our position that in the case at bar the liability of Halcyon was primary and that of Haenn but secondary is buttressed by the obligation of a shipowner which was enunciated by this Court in *Seas Shipping Co. v. Sieracki.*[9] The doctrine of that case has been extended to cover a shoreside carpenter working aboard the vessel. *Sulovitz v. United States.*[10]

An examination of the Complaint by Baccile against Halcyon (R. 7) clearly indicates that Baccile predicated his cause of action against Halcyon upon its failure to provide him with a safe place in which to work and the fact that it

9. 328 U. S. 85.
10. 64 F. Supp. 637.

did provide him with an unsafe place to work and an unseaworthy appliance.

In effect what the two Courts below have held is that while Baccile was entitled to predicate a cause of action against Halcyon upon a breach of the so-called "warranty of seaworthiness" promulgated in the *Sieracki* Decision, *supra*, Haenn was not entitled to the benefit of that same warranty.

That is not logic nor, we submit, good law.

When Baccile was aboard Halcyon's ship he was there as one member of a class, the representatives of Haenn. Baccile was aboard in Haenn's shoes and his rights were neither more nor less than those of his employer. To each Halcyon owed the same duty. The duty was not varied one iota by the fact that Baccile was injured. The fact of injury had no effect upon the duty owing by Halcyon. It was merely another one of the steps necessary to give rise to a cause of action.

For the Courts below to have ignored this point and in effect to have held that Halcyon owed Baccile a different duty than that which it owed to Haenn is a modification if not an emasculation of the doctrine which this Court promulgated in the *Sieracki* decision. One of the bases of the doctrine of the *Sieracki* case was that

> "The latter (the employer of the injured stevedore) has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them".[11]

In the case at bar no evidence was introduced to show that the peril, the cleat which gave way, was obvious and there was certainly no evidence that any act of the employer created this situation. It was instead an appliance fur-

11. 328 U. S. 85 at 95.

nished by the shipowner for use in the manner in which Haenn's employees utilized it (R. 79, 115, 116, 125 and 129). Thus it comes within the rule of the cases cited above.

> *"This we say on the assumption that there is a manifest distinction, though at times lost sight of, between suits in contribution and suits in indemnity.* For, as is often said, the latter implies a primary or basic liability in one person, though a second is also liable with the first to a third. In such a case the discharge of the obligation by the second person leaves with him a right to secure compensation from the one who, as between themselves, is primarily liable."[12] (Emphasis ours.)

The District Court specifically refused to charge the jury on the subject of the duty which Halcyon owed to Haenn to furnish Haenn and its employees with a seaworthy vessel and appliances (R. 163) and the Court of Appeals has approved that rule. It seems to us that it is so demonstrably fallacious as to require a restatement by this Court of the fundamental rights and duties as among a shipowner, a contractor and the contractor's employee, and the extent of the seaworthiness doctrine promulgated by this Court in the *Sieracki* decision.

We urge that the correct rule is stated by the Court of Appeals for the Second Circuit in *Grasso v. Lorentzen*,[13] where the Court states:

> "The latter (the stevedore) could rely upon its (a strap furnished the stevedore by the shipowner) being suitable, its appearance not showing the contrary, without inspection for hidden defects before use".

The same rule has been stated another way in *Altadona v. United States*,[14] where the Court held, as follows:

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12. *George's Radio v. Capital Transit Co.*, 126 F. 2nd 219 at 222.
13. 149 F. 2nd 127 at 129.
14. 91 F. Supp. 33 at 36.

"Under the circumstances Mercantile (a ship repair contracting company) might assume that the place where its men were working, including the stanchions, were safe and in a safe condition. That does not mean that Mercantile could blindly have its men work in and around the guard rail without looking at it but if the appearance indicated no danger or defects an inspection for latent defects was not required of it. It would be unreasonable in the absence of any visible sign of defectiveness to expect Mercantile to minutely examine each and every part of the vessel where its men were working and to apply expert scrutiny of those parts and places before permitting its men to work there".

In concluding our argument on this subject we point out to the Court that in view of the evidence as to the custom to have stage planking in the bottom of grain feeders, there was an implied invitation by Halcyon to use this appliance in the usual way. The fact that other methods might have been utilized does not change that fundamental legal principle.

". . . While it is true, as the record reveals, that the independent contractors' rigging may have been fastened to the top of defendants' smoke stack by several methods, yet plaintiff's testimony clearly establishes the fact that . . . is the method ordinarily and customarily adopted by those engaged in stack painting and is as safe as any other known manner. Therefore, there was an implied invitation on the part of defendants for plaintiff to use this cable for that purpose . . .". *Sorrentino v. Graziano*, 341 Pa. 113 at 116.

The A. L. I. Restatement of The Law of Restitution, § 93, likewise applies.

"Where a person has *supplied* to another a chattel which because of the supplier's negligence or *other*

fault is dangerously defective for the use for which it is supplied and both have become liable in tort to a third person injured by such use, the supplier is under a duty to indemnify the other for expenditures properly made in discharge of the claim of the third person, if the other used or disposed of the chattel in reliance upon the supplier's care and if, as between the two, such reliance was justifiable." (Emphasis ours.)

The invitation to use was extended to Haenn, the contractor, as well as to Baccile, the contractor's employee. Both upon the principle that Halcyon thus furnished an appliance which was unseaworthy because it failed in normal use, and because of the equal right of both to rely upon Halcyon to fulfill its duty to furnish a seaworthy vessel, the primary liability for the injury to Baccile rested upon Halcyon. It was the party against whom judgment had been entered and the most that its proofs showed was a failure on the part of Haenn either to go about the work in a safer way or to inspect and discover the defect in the appliance which Halcyon had furnished to it. We urge that Haenn was not under any duty to Halcyon to go about Haenn's work in what, by hindsight, may prove to have been the safest way. It was entitled to go about its work in the usual way unless warned by Halcyon of the danger of such a course of action. Admittedly no such warning was given (R. 57). Alternatively Haenn was not under any duty to Halcyon to inspect and discover a defect in an appliance furnished to it no matter what duty Haenn may have had along these lines to Baccile. Halcyon does not stand in Baccile's shoes in seeking recovery from Haenn. Halcyon must predicate any right to contribution upon the breach of a duty which Haenn owed to it. We submit that the record in this case will not support a finding of the breach of any such duty and that under familiar legal principles Haenn's liability is but secondary and Halcyon, the party primarily liable, cannot recover either contribution or indemnity from Haenn. We liken it to an equitable estoppel which should

now prevent Halcyon from recovering from Haenn because Haenn utilized an appliance furnished by Halcyon and relied upon Halcyon to furnish a proper one for the purpose intended.

We respectfully submit that the result we here urge follows from prior decision by this Court in the following cases:

Washington Gaslight Co. v. District of Columbia;[15]

Union Stock Yards Co. v. Chicago, R. & Q. R. R. Co.;[16]

Fuller Co. v. Otis Elevator Co.[17]

In both the *Washington Gaslight* and *Fuller Co.* cases full indemnity was granted. In the *Union Stock Yards* case the action was for *indemnity*. Since the negligence charged to both parties was a failure to inspect, indemnity was not permitted. It is, however, implicit in the decision that the correct legal principle calls for the result we here urge. Particularly appropriate is this Court's reference to primary liability of a party "who *furnishes* a defective dock" (emphasis ours). The Court was there referring to *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*[18] which it had cited earlier in its Opinion.[19]

This is not a case where both Halcyon and Haenn were guilty of the same breach, failure to inspect. Halcyon would have this Court so believe.[20] In so arguing Halcyon ignores the fact that it *furnished* the appliance which failed and that it had another and separate duty to supply a *seaworthy* appliance under the rule of the *Sieracki* case. We suggest that to accept Halcyon's argument would be tantamount to a holding that Haenn, the contractor, had a duty identical and co-extensive with that of Halcyon to furnish

15. 161 U. S. 316.
16. 196 U. S. 217.
17. 245 U. S. 489.
18. 134 N. Y. 461.
19. There is an excellent discussion of the Stock Yards case in *George's Radio, Inc. v. Capitol Transit Co.*, 126 F. 2nd 219 at 222. Mr. Chief Justice Vinson was a member of the Court which decided that case.
20. Halcyon's Brief as Petitioner in No. 62, page 14.

a seaworthy ship. It does not make for practical or legal logic to hold a contractor to such a duty.

As was said by the Court of Appeals for the Second Circuit in *American Mutual Liability Ins. Co. v. Matthews:*[21]

> "In both of those cases, the primary cause of injury to the employee was breach of a contractual duty owed to the promisee to do the work properly. In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable."

CONCLUSION.

We respectfully urge that this Court examine and clarify the doctrine of indemnity in cases sounding in tort. A decision on this point logically precedes any determination of the *amount of contribution* or the effect of the Compensation Act upon the problem because if Haenn's position is correct and this Court so holds, the questions raised in Halcyon's Petition become moot.

Respectfully submitted,

MARK D. ALEPACH,
JOHN B. SHAW,
T. E. BYRNE, JR.,
Counsel for Cross-Petitioner.

KRUSEN, EVANS & SHAW,
Of Counsel.

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21. 182 F. 2nd 322 at 324.

SUPREME COUR...

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 197.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Petitioner,

v.

HALCYON LINES AND VINKE AND COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
GEORGE M. BRODHEAD,
1910 Packard Building,
Philadelphia 2, Pa.,
Counsel for Respondents.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

	Page
OPINIONS BELOW	1
JURISDICTION	1
COUNTER STATEMENT OF THE CASE	2
ARGUMENT	5
I. The Charge of the Trial Court Was Correct and the Evidence Supports the Special Findings of the Jury	5
(A) The Charge and Special Findings of the Jury	5
(B) The Evidence Shows That a Proper Inspection Would Have Disclosed the Plank to Be Unsafe	7
II. The Petitioner and the Respondents Are Joint Tort Feasors and Are Obligated to Share the Damages Caused by Their Concurrent Negligence	10
(A) There Is No Warranty of Seaworthiness	13
(B) The Facts of This Case Do Not Bring It Within the Scope of a Warranty of Seaworthiness	16
CONCLUSION	19

TABLE OF CITATIONS.

	Page
Barbarino v. Stanhope S. S. Co., 151 F. 2d 553 (C. A. 2, 1945)	12
Bruszewski v. Isthmian S. S. Co., 163 F. 2d 720 (C. A. 3, 1947), cert. den. 333 U. S. 828	18
Eagle Indemnity Co. v. United States Lines Co., 86 F. Supp. 949 (D. C. Md. 1949)	15
Guerrini v. United States, 167 F. 2d 352 (C. A. 2, 1948	15
Landgraf v. United States, 75 F. Supp. 58 (D. C. E. D. Pa. 1947), affirmed in 174 F. 2d 1022 (C. A. 3, 1949)	11
Lavender v. Kurn, 327 U. S. 645 (1946)	9
Lynch v. United States, 163 F. 2d 97 (C. A. 2, 1947)	15
Miller v. The Sultana, 176 F. 2d 203 (C. A. 2, 1949)	15
O'Connell v. Naess, 176 F. 2d 138 (C. A. 2, 1949)	15
The Osceola, 189 U. S. 158 (1903)	16
Porello v. United States, 153 F. 2d 605 (C. A. 2, 1946)	10
The S. S. Samovar, 72 F. Supp. 574 (D. C. N. D. Cal. 1947)	12
Seas Shipping Co., Inc. v. Sieracki, 328 U. S. 85 (1946)	13
Sulovitz v. United States, 64 F. Supp. 637 (D. C. E. D. Pa. 1945)	15
The Tampico, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942)	11
United States Code, Title 28, Section 1254(1)	1

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

This case comes before the Court on writ of certiorari issued to review final judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed April 3, 1950, appears on R. 175 to 179, inclusive, and R. 221 to 226, inclusive, of the record and is reported in 89 F. Supp. 765. The opinion of Circuit Judge Kalodner of the United States Court of Appeals for the Third Circuit, filed February 21, 1951, appears on R. 229 to 235, inclusive, of the record and is reported in 187 F. 2d 403.

JURISDICTION.

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the Third Circuit is provided in Section 1254(1) of Title 28, United States Code.

COUNTER STATEMENT OF THE CASE.

In the factual history of the case as stated by the petitioner (p. 3, Pet. Brief) there are lacking certain facts necessary to a complete understanding of the circumstances of the case. We do not here restate all of the facts, but rather supplement those stated by the petitioner.

The grain fittings and the grain feeder are temporary wooden structures built into the hatches and holds of the ship *solely* to enable it to carry a cargo of bulk grain, and if other cargo is to be carried, they are taken out, leaving the vessel structurally the same as before they were built. They would interfere with carrying any other kind of cargo (R. 49, 58, 78).

The two stage planks in the grain feeder in question were pieces of lumber, each about 8 feet long, 3 inches thick and 10 inches wide, running fore and aft near the bottom of the feeder. The ends of these timbers generally rested upon "cleats" which were pieces of wood 15 to 18 inches long, 2 inches thick and 6 inches wide, nailed to the forward and after walls of the feeder (R. 113, 114, 115). These are installed by the workmen who built the feeder and who *themselves* would use them as staging or scaffold on which to stand while lining the inside walls of the feeder with burlap to make it grain tight (R. 115). When these timbers have served the purpose of enabling the workmen to line it, they are sometimes left in place if they are timbers belonging to the vessel, but also sometimes removed if they are lumber belonging to the grain fitters (R. 116).

These two timbers are installed only for the convenience of the workmen building the feeder and are not a necessary part of its construction and have no relation to its function as a grain feeder (R. 49, 78, 79).

It is pointedly urged by the petitioner that there were six feeders in the vessel, but the evidence relates only to the presence of a feeder each in No. 2 and No. 4 holds (R. 80, 83, 84, 85, 92, 123). There is no evidence that there

were feeders in any other holds or that there were stage planks in any other feeders. The significance of the suggested fact of there being six feeders is not clear, except possibly as the basis for an argument that the feeders and stage planks in them are "appliances" of the ship rather than temporary structures.

The petitioner specializes in the business of shoring all kinds of cargo and fitting out grain ships (R. 64, 65). The method of doing the work was determined by the petitioner's employes in the light of long experience without any assistance or advice from the officers or crew of the vessel (R. 68, 69, 81).

The petitioner brought aboard its own gear and equipment necessary to do the work, such as ladders, chains, pennants, blocks, hooks and ropes (R. 69, 70, 81, 82).

The evidence does not support the statement that the lowering of a ladder into the feeder and resting it on the so-called stage planks was in accordance with a long-standing custom. We find no evidence in the record that there was any custom or customary way of workmen entering a feeder further than the testimony of Baccile to the effect that every ship on which he ever worked had stage plankings in them. His foreman who was working with him at the time did not testify as to the existence of any custom of the method of entering a grain feeder. He had worked only for the petitioner (R. 95).

The record does not support petitioner's statement that "it is necessary to know that it is the practice that grain feeders similar to the one here in question are *always* fitted with stage planks at the bottom and that workmen coming aboard to make alterations or minor repairs to the feeders *always* utilize these planks as the only available practical platform from which their work can be done (R. 129)" (p. 7, Pet. Brief). The testimony referred to as supporting the statement just quoted is that of Baccile, the injured man, and is limited to his personal experience. There is no other testimony to support the alleged practice.

Before Baccile descended the ladder, no inspection was made to see whether the timber on which the end of the ladder was to be rested was secure. The foreman, before lowering the ladder onto the plank with the assistance of the injured man, used the ladder to tap the plank at the end where it was to be rested and in the middle in an attempt to ascertain whether the plank was sound, but no other inspection of the plank or its fastening was made (R. 87). He did not tap the end of the plank which gave way (R. 98). He did not testify that this was a customary test. He said: "I testified that it is not a test, it is merely a habit" (R. 97). Neither Baccile nor his foreman, from where they stood on deck, could see the ends of the plank or the condition of the cleats under them, as the burlap had fallen and obscured them (R. 88, 129). The foreman in charge of all work on this ship made no inspection of No. 2 hold before starting work therein as he did not have time so to do (R. 825).

The ladder, after being placed upon the plank, was not secured either at top or bottom by a rope or other means (R. 90, 130). The inside of the feeder could have been entered for the purpose of inspecting the plank by a rope ladder, but none was furnished by the petitioner (R. 50, 132, 133).

Running parallel and slightly lower than the planks were two steel beams which were part of the ship's permanent equipment (R. 89, 127). It was demonstrated at the trial by the use of a scale model of the hold of the vessel that a platform made of hatch covers or other boards could have been laid down on these beams and lashed to them and thus provide a safe working place (R. 50, 51, 52, 55, 131, 132).

Argument.

I. THE CHARGE OF THE TRIAL COURT WAS CORRECT AND THE EVIDENCE SUPPORTS THE SPECIAL FINDINGS OF THE JURY.

(A) The Charge and Special Findings of the Jury.

The trial judge properly charged the jury that the petitioner would be negligent if it failed (1) to make proper inspection, (2) to furnish competent foremen and supervisors and (3) to perform its work in a careful and proper manner (R. 160).

There was sufficient evidence from which the jury could have found against the petitioner on all of these issues.

The petitioner's contention that there were alternate theories of recovery is without merit. The respondents claim contribution from the petitioner on the ground that it was *negligent* and jointly liable for any recovery which the plaintiff might make against the respondents. The basis for claiming contribution was *negligence*, and some of the specifications of negligence were that the petitioner neglected to make adequate inspection of the staging, failed to provide a safe working place for the plaintiff and neglected to provide necessary safeguards to prevent the injury and provide for the plaintiff's safety, and in other respects to be shown at the trial (R. 14, 15).

The proof of any *one* of these specifications was sufficient to sustain the charge of negligence which is the basis of the respondents' cause of action. The respondents did not claim that there was any other basis upon which the petitioner could be liable to contribute to them.

The petitioner contends that there was error *only* in instructing the jury that there was a duty on the petitioner to inspect.

There is no merit to the contention that the verdict is a general one which might have been founded solely on the failure of respondents to inspect.

There was no general verdict in this case. It is clear from the record that the trial judge did not direct the jury to render a general verdict, but submitted specific questions to them and required definite answers. The questions submitted were, as follows:

> "'Were the employees of Haenn Ship Ceiling and Refitting Corporation negligent so that they caused or substantially contributed to the injuries sustained by the Plaintiff Baccile?'
>
> "You will answer that 'yes' or 'no'.
>
> "If your answer to that is 'yes', then state the percentages by which the original defendant Halcyon and the third party defendant Haenn were negligent so as to contribute to the injuries sustained by the plaintiff.
>
> "Then we have a little line, 'Haenn Ship Ceiling and Refitting Corporation,' and the percentage.
>
> "'Those in charge of the S. S. "Stad Vlaardingen" and the little line for the percentage.'" (R. 214)

The jury's answer to the first question was "Yes". In answer to the second Interrogatory, the percentage of negligence was found as to the petitioner to be 75% and as to the respondents 25% (R. 218, 219).

Notwithstanding these special findings by the jury, the petitioner erroneously takes the position that from these findings it could be maintained that the jury might have found that the petitioner was negligent only in respect to a failure to inspect the planks. The record does not justify such a conclusion but, on the contrary, indicates that the jury found the petitioner negligent not only in having failed to inspect the planks, but also in having failed to perform its work properly. The only negligence which could be attributable to the respondents as shipowners was their fail-

ure to inspect the planks and to warn of the existence of known dangers (R. 161). If the only negligence of the petitioner was that of likewise having failed to inspect the planks, the jury would have found them equally negligent. Such was not the case, as the jury specifically found that the negligence of the petitioner amounted to 75%.

The district court, in reviewing the case on the Motion for Judgment N. O. V. recognized that the negligence of the petitioner, as found by the jury in its special findings, was based not only upon a failure to inspect, but upon other negligent acts relating to the manner and way in which it proceeded with its work (R. 223, 224), and mentioned other evidence from which the jury might properly have found that the petitioner did not perform the work in a reasonably safe manner (R. 224).

The petitioner makes the unwarranted assumption that "it is obvious that the Court of Appeals in no manner examined or disposed of Haenn's contentions" (p. 11, Pet. Brief). It is further stated: "The failure of the Court of Appeals to examine Haenn's contentions goes to the very heart of this case" (p. 14, Pet. Brief).

There is nothing to indicate that the Court of Appeals did not fully examine all of the evidence and consider the proper inferences deducible therefrom. That Court said:

> "On a review of the record, we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn *negligent*, not merely in failing to inspect, but as well in failing to go about its work properly." (R. 231) (Italics ours)

(B) The Evidence Shows That a Proper Inspection Would Have Disclosed the Plank to Be Unsafe.

The petitioner does not take the position that there was no duty to inspect but contends that there is no causal connection between the failure to inspect and the accident as the evidence does not show that any inspection, super-

ficial or thorough, would have revealed that the plank was insecure (p. 14, Pet. Brief).

The petitioner flatly says that there is no evidence in the record that an inspection would have revealed any defect, but refrains from discussing any of the testimony pertaining to the *lack* of inspection.

Whether an inspection would have disclosed an unsafe condition was one of the issues of fact properly before the jury, and there was ample evidence from which the jury could infer that an inspection would have disclosed that the end of the plank which gave way was not securely fastened. The facts which the jury had as a basis for its finding were in brief, as follows: The plank was at most 10 inches wide. The end rested upon a cleat or piece of wood which was 15 to 18 inches long, and therefore extended beyond the sides of the plank (R. 113, 114). Had the burlap which was draped over the ends of the plank been raised, which was not done (R. 88, 129), it could have been seen whether the cleat was tightly nailed to the wall of the feeder or whether it was loose or entirely missing (R. 133). If there had been any doubt as to the stability of the cleat, additional nails could have been put in it. This inspection could have been made by means of a rope ladder lowered into the feeder, but no such ladder was brought on board by the petitioner (R. 132, 133).

The perfunctory tapping of the plank in question in the center and at the forward end, as stated by the man who did it, was not intended as an inspection or test (R. 87, 98). He was rather looking for a cracked plank which might have been indicated by the sound of the tapping, but he did not tap the end of the plank which gave way (R. 87, 98). In view of the fact that plank was at a great distance, above the bottom of the ship, a high degree of care was required before sending a man on it to work.

In the face of these undisputed facts it is idle to say that a proper inspection would have disclosed nothing. It was for the jury to decide upon all of the evidence

whether an inspection, if made, would have disclosed that the plank was insecure, and this they could do by inference from the facts adduced. By their special findings the jury have determined this question, and, it is no longer subject to attack in this appellate proceeding.

In *Lavender v. Kurn*, 327 U. S. 645, 653 (1946) this Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

There was no error in the charge of the trial judge that there was a duty to inspect since the evidence justified the jury in inferring and finding that a proper inspection would have disclosed the dangerous condition of the plank.

II. THE PETITIONER AND THE RESPONDENTS ARE JOINT TORT FEASORS AND ARE OBLIGATED TO SHARE THE DAMAGES CAUSED BY THEIR CONCURRENT NEGLIGENCE.

We do not here discuss the proportion of the damages which must be borne by the respective parties, as that question is treated in our brief as petitioners in No. 62, October Term, 1951.

The negligence of the petitioner herein consisted of failure (1) to make proper inspection, (2) to furnish competent foremen and supervisors and (3) to perform its work in a careful and proper manner.

The negligence of the respondents was the failure (1) to make proper inspection and (2) to warn petitioner of any known dangerous conditions on the vessel.

As heretofore demonstrated, these issues were fully and properly submitted to the jury (R. 160, 161, 162) which, by its special findings, has determined that both the petitioner and respondents were negligent to the extent that they caused or substantially contributed to the injuries of the plaintiff (R. 173).

Although the acts of the respective parties which constituted negligence were not identical in quality or were done at the same time, together they caused or contributed to the injury.

Negligent acts of two parties done at different times and not of the same character may be considered as the proximate cause of an accident when they contribute to it. In *Porello v. United States*, 153 F. 2d 605, 607 (C. A. 2, 1946),—reversed on other grounds—the court said:

> "The unsound notion that there can be but one 'proximate cause' of an accidental injury has caused some confusion in the cases. None of the authorities cited is applicable to the facts at bar. In our opinion the absence of the lock and Di Mare's negligent order operated concurrently in producing the result."

See *Landgraf v. United States*, 75 F. Supp. 58 (D. C. E. D. Pa. 1947), affirmed in 174 F. 2d 1022 (C. A. 3, 1949) per curiam on the opinion of the court below.

In *The Tampico*, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942), a stevedore engaged in discharging cargo from a barge was injured. The evidence established that his injuries were caused by a defective condition of one of the A-frames of the barge and the concurring negligence of the signal man, the foreman and the crane operator, all of whom were fellow employees of the libellant. The libellant was awarded damages which were divided between his employer, the stevedore, and the owner of the defective barge. In that case the negligence of the barge owner consisted of maintaining a defective barge, whereas the negligence of the libellant's employer were acts of omission or commission committed by other employees of the stevedore in the course of performing the work. Thus the negligence of one of the two joint tort feasors in that case was passive and the other active, which was held to be a basis for contribution. In that case the court said (p. 175):

> "Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force. 'The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. [citation] Whatever its origin, the admiralty rule in this country is well known to be the other way. [citations] . . .'. *Erie R. R. Co. v. Erie Transportation Co.*, 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450. Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., § 901, et seq., is immune from suits for damages resulting from libellant's injuries brought by the libellant or anyone in his right, according to

the provision of Section 905 of the Act. But the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort. *Erie R. R. Co. v. Erie Transportation Co., supra,* 204 U. S. page 226, 27 S. Ct. 246, 51 L. Ed. 450."

In *The S. S. Samovar,* 72 F. Supp. 574 (D. C. N. D. Cal. 1947), injury to a stevedore was caused by a defective pad-eye (p. 581), a part of the ship's appurtenances, and the concurring negligence of the stevedore foreman in charge of the work (p. 590). In that case it was held that, although the negligence of the respective parties was different in character, there was contribution between the joint tort feasors. The court said (p. 589):

"If, by reason of limitation of liability or other statutory immunity, a libelant cannot recover directly from one of two joint tort-feasors, he may proceed against one for the full amount of his damages, and the latter would have a right of contribution for one-half from the other tort-feasor. Aktieselskabet Cuzco vs. The Sucarseco, supra, 294 U. S. at pages 400, 401, 55 S. Ct. 467, 79 L. Ed. 942; The Chattahooche supra, 173 U. S. at page 540, 19 S. Ct. 491, 43 L. Ed. 801. This right of contribution may even be enforced by a separate libel in admiralty after a decree in the original action. Erie R. R. Co. v. Erie & Western Transp. Co., supra, 204 U. S. at page 225, 27 S. Ct. 246, 51 L. Ed. 450."

In *Barbarino v. Stanhope S. S. Co.,* 151 F. 2d 553, (C. A. 2, 1945) the district court dismissed a shipowner's petition to implead libellant's employer. The Court of Appeals reversed, saying, in part (p. 555):

"It would be somewhat difficult to find that the shipowner had any interest to reverse the decree dismissing its petition to implead the stevedore, if the action had been at law in a jurisdiction where there

was no contribution between joint tortfeasors. . . . Whether that would be enough interest to support an appeal we need not decide, because the suit is in the admiralty where contribution between joint tortfeasors has existed since 1875. The Alabama, 92 U. S. 695, 23 L. Ed. 763. The consequence of that right is that the shipowner has a very real interest in holding the stevedore liable."

Petitioner argues that instead of being a joint tort feasor liable for contribution, it is only secondarily liable for Baccile's damages and that the respondents are primarily liable. An analysis of this contention shows that it is based on an erroneous interpretation of the decision of this Court in the case of *Seas Shipping Co., Inc. v. Sieracki*, 338 U. S. 85 (1946), which held that there was a warranty of seaworthiness by the ship in favor of a *stevedore*.

(A) There Is No Warranty of Seaworthiness.

The petitioner is not a stevedore.

Even though Baccile had the benefit of a warranty of seaworthiness—which is not conceded—the petitioner by reason of being his employer does not acquire the same right.

It has not been determined whether the injuries sustained by Baccile were caused by the unseaworthiness of the vessel or by its negligence, as his claim was not litigated.

The rule in *Seas Shipping Co., Inc. v. Sieracki, supra*, which extends to *stevedores* a shipowner's obligation of seaworthiness traditionally owed to seamen was based upon the fact that individual stevedores were performing maritime duties which historically had been performed by seamen. Seamen were entitled to the protection of this warranty because they were bound at sea and in port to carry out the orders of their superior officers and had to work with such tools, and appurtenances as the shipowner furnished to them, and were obliged to work under conditions